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# CONSENT OF THE PARTIES TO THEIR MARRIAGE

THE notion of consent in the law of marriage has two completely different aspects. The first is the consent, external and objective, required of parents or other third parties: the second is the consent, subjective and internal, of the would-be spouses themselves. It is this latter consent in domestic law that is to be analysed in the present discussion. The requirements in English law as to the consent of parents and guardians are not mandatory but directory only: the absence of this tutelary consent does not necessarily invalidate a marriage.[1] On the other hand, it is said that without the consent of the parties themselves at the time of the ceremony there can be no valid marriage: *consensus non concubitus facit matrimonium*.[2] The consent of the parties themselves to their own marriage must itself be understood in two main senses. The one consists of such rationality of the parties, ascertained by reaching an arbitrary age (fixed by law) or by some other means, whereby the parties shall be deemed capable of understanding the nature of the marriage ceremony and physically apt to take part in it; this is basically a question of physical and mental maturity.[3] The other takes for granted the existence of rationality in this sense; it demands that the parties in fact freely give their own mental consent to the marriage in question. Where rationality is not in issue in the cases to be considered, externally there will be appearance of voluntary agreement by the parties to a particular marriage, but investigation will show that the consent is possessed of no reality.

One other general point needs emphasis: 'While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of

[1] *R.* v. *Birmingham* (1828) 8 B. & C. 29; *Chichester* v. *Mure* (1863) 3 Sw. & Tr. 223; *P.* v. *S.* (1868) 37 L.J.(P.) 80, 81; cf. *Breen* v. *Breen* (1923) 3 D.L.R. 600 (Alberta).

[2] *A.* v. *B.* (1868) 1 P. & D. 559, 562; *Sullivan* v. *Sullivan* (1818) 2 Hag.Con. 238, 246; affirmed (1819) 3 Phill. 45: Ayliffe's *Parergon Juris Canonici*, p. 361, cited in *Moss* v. *Moss* [1897] P. 263, 271–72; cf. *Lang* v. *Lang*, 1921 S.C. 44, 53 (Scotland); *Jackson* v. *Winne* (1831) 7 Wendell 47; 22 Am.Dec. 563 (see footnote 58, below); *Lawless* v. *Chamberlain* (1889) 18 O.R.(Ch.) 296, 297 (Ontario); *Lange* v. *Lange* [1945] A.D. 332, 334–42 (South Africa).

[3] See *per* Sir Francis Jeune P., *Moss* v. *Moss* [1897] P. 263, 268; cf. Macdonald J., *Thaker* v. *Jennison* (1921), 61 D.L.R. 161, 162 (British Columbia).

ordinary civil contracts '.[4] Lack of consent sufficient to rescind an ordinary commercial contract may not justify the annulment of a marriage[5]; and where a marriage is annulled through lack of a party's consent, very clear and cogent evidence must be given to rebut the presumption that it has in fact been given.[6]

Subjective consent may be classified as follows :—

(1) The non-existent mind :
  (a) Mental weakness;
  (b) Intoxication, drugs, hypnotism;
  (c) Health;
  (d) Duress and force.
(2) Abuse of, or mistake as to the nature of the ceremony :
  (a) Sham marriages;
  (b) Mistake as to nature;
  (c) Mistake as to effect.
(3) Mistake or error as to the person.

While these defects all relate to consent, the existence of some of them only make a marriage voidable, whereas others make a marriage void *ipso jure*. The importance of this distinction received statutory emphasis when, in section 4 of the Law Reform (Miscellaneous Provisions) Act, 1949, now s. 9 of the Matrimonial Causes Act, 1950, it was enacted that the legitimacy of children of a voidable marriage was to be preserved notwithstanding a decree annulling such a marriage *ab initio*. As to fraud, while it is sometimes talked of as an independent ground of annulment of a marriage induced by it, in practice it is usually a species of the genus mistake.[7] Finally, the notions of the validation of void and the ratification of voidable marriages, as well as of the creation of marriages by estoppel, intrude into these cases, and will be dealt with separately.

### The Non-existent Mind

In this category it is the prima facie rationality of the parties that is rebutted.

(a) *Mental weakness of a party.*

The marriage of certified lunatics is void under the terms of an Act of 1742, re-enacted and extended to Ireland in 1811.[8] The

[4] *Moss* v. *Moss* [1897] P. at p. 266; also *Mordaunt* v. *Mordaunt* (1870) L.R. 2 P. & D. 103, 126–27; *Niboyet* v. *Niboyet* (1878) 4 P.D. 1, 11; *Way* v. *Way* [1949] 2 All E.R. at p. 960.

[5] See *Swift* v. *Kelly* (1835) 3 Knapp 257, 293, P.C.

[6] *Cooper* v. *Crane* [1891] P. 369.

[7] Compare Cheshire, *Private International Law* (3rd ed.), p. 435, with Wolff, *Private International Law* (2nd ed.), pp. 78 and 327. See also footnote 21, *infra*, and text thereon, for the effect of fraud on a person of weak mind. Also footnote 16, *infra*.

[8] 15 Geo. 2, c. 30 (1) : 51 Geo. 3, c. 37 : cf. *Meanwell* v. *Meanwell* [1941] 2 D.L.R. 655 (Manitoba), and see *Manella* v. *Manella* [1942] 4 D.L.R. 712 (Ontario). At one time, the marriage of ' idiots ' was valid at common law. In the case of a marriage void under the statutes, no proceedings were needed

remedy given by the statute related only to certifications made before the marriage ceremony; a certification of lunacy after the marriage might, however, be evidence indicative of unsoundness of mind existing at the time of the ceremony.[9] Unsoundness of mind of one of the parties at the time of celebration of the marriage has for centuries been a ground of annulment, and this ground, subject to certain provisos, has been reiterated in section 8 (1) (*b*) of the Matrimonial Causes Act, 1950.[10] The statutory provision, first enacted in 1937, is in addition to that provided by common law, but while marriages impeached under the Act are merely voidable, marriages defective at common law for unsoundness of mind are void *ipso jure*.[11] The statute leaves children of such marriages legitimate; at common law they are always to be considered as bastards. Section 8 (1) (*b*) applies also to mental defectives within the meaning of the Mental Deficiency Acts, 1913–27,[12] that is to idiots, imbeciles, feeble-minded persons, and moral defectives. A marriage voidable by section 8 (1) (*b*) is subject to the proviso that the petitioner was, at the time of the marriage, ignorant of

to have the marriage declared void, Shelford, *The Law of Lunacy*, 2nd ed. (1847), p. 576; cf. Wood Renton, *Lunacy* (1897), pp. 17 ff.; *Ex p. Turing* (1812) 1 Ves. & Bea. 140, 141 n.; cf. *De Reneville* v. *De Reneville* [1948] P. 100, 110–11; [1948] 1 All E.R. 56, 60, C.A. See also Shelford, *Marriage and Divorce* (1841), p. 183. The statute of 1742 was repealed by the Statute Law Revision Act, 1873, c. 91, but its provisions are still in force by virtue of the 1811 Act which had re-enacted them.

[9] *Browning* v. *Reane* (1812) 2 Phill. 69, 70, 90. See 1 Blackstone, *Comm.* 438–39.

[10] Re-enacting s. 7 (1) (*b*) of the 1937 Act, 1 Edw. 8 & 1 Geo. 6, c. 57. Unsoundness of mind, it was held in a Quebec court, did not prevent a woman from understanding the serious nature of the marriage contract and thereby giving a valid consent, *Richer* v. *Pharand* [1948] K.B. 16 (Queb.Reps.): cf. *Bell* v. *Johnston* [1946] 3 D.L.R. 310 (Sask.); *True* v. *Ranney* (1850) 21 N.H. 52, 54 (New Hampshire). But in the South African courts understanding or appreciation of the nature of the marriage contract has been rejected as a test of valid consent, *Lange* v. *Lange* [1945] A.D. 332 (South Africa).

[11] This is shown by the fact that such a marriage can be put in issue after the death of one of the parties to it, *Parker* v. *Parker* (1757) 2 Lee 382; *Browning* v. *Reane* (1812) 2 Phill.Ecc. 69; also *Ellis* v. *Bowman* (1851) 17 L.T.(o.s.) 10. The dividing line in civil courts before the Reformation was between marriages which could only be proved invalid by a sentence of an ecclesiastical court, and those which could be impeached by other evidence also, see *per* Ronan L.J. in *P.* v. *P.* [1916] 2 Ir.R. 400, 434. 'It was the interference of the common law courts which . . . prohibited the spiritual courts from bastardising the issue after death of one of the parties, that created the distinction—the very unnatural distinction—of voidable and void: for voidable is void, *ab initio*.' *Per* Dr. Lushington, *Ray* v. *Sherwood* (1836) 1 Curt. 173, 188; cf. 2 Co.Inst. 614.

[12] 17 & 18 Geo. 5, c. 33. Mental defectiveness is defined as 'a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury'. The old law was that unsoundness of mind had to be of progressive growth and development, existing 'before as well as after the marriage contract was entered into'. See *Jackson* v. *Jackson* [1908] P. 308, 310, and *Turner* v. *Meyers* (1808) 1 Hag.Con. 414, 417. Cf. *True* v. *Ranney* (1850) 21 N.H. 52 (New Hampshire), where Gilchrist C.J., citing from *Turner* v. *Meyers*, said, pp. 53–4, that the early law that a marriage was not invalid because one of the contracting parties was insane *tempore celebrationis* was 'founded on some notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character'.

the facts on which the petition is based, that proceedings were instituted within a year of the date of marriage, and that marital intercourse had not taken place since the discovery by the petitioner of the existence of the ground for a decree. The Court of Appeal has held [13] that this proviso is not equitable : the period of one year is read strictly as a year from the date of the marriage, not from the date of the discovery of the defect, this being so even when there has been fraud on the petitioner. Parliament, it was said, had used unambiguous language in dealing with these proceedings to alter the status of the parties, and it would be wrong to extend the specified period in a way which might (as the law then was) render the children of some marriages illegitimate. It is to be observed, however, that it is specifically provided that any child born of a voidable marriage avoided pursuant to section 8 (1) (*b*) should remain legitimate notwithstanding the words of the decree annulling the marriage *ab initio*.[14] There would seem to be even less justification for this line of reasoning since section 9 of the 1950 Act (re-enacting s. 4 of the Act of 1949) provides, without any proviso, that where a voidable marriage is annulled, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, on the date of the decree, shall be deemed to be their legitimate child notwithstanding the annulment. A more generous interpretation of the proviso to section 8 (1) (*b*) can now be taken only by the House of Lords or by the Legislature.

The Act of 1950, re-enacting the 1937 Act and the Judicature Act, 1925, makes provision for divorce if the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.[15] Such a petitioner would either have to be of unsound mind at the date of the petition without advantage being taken within due time of section 8 or of the common law remedy, or else, and more usually, have become of unsound mind since the marriage was contracted. Hitherto, insanity subsequent to marriage afforded the other spouse no remedy.[16]

[13] *Chaplin* v. *Chaplin* [1948] 2 All E.R. 408; [1949] P. 72. See also *Smith* v. *Smith* [1940] P. 179 (interpretation of 'year'), and *Smith* v. *Smith* [1948] P. 77.

[14] Section 7 (2) repealed and replaced by the Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100), s. 4. In this respect the Legislature has adopted the canon law putative marriage doctrine, without attempting a general revision of the wording of the decree, on which see Lord Greene, then M.R., in *De Reneville* v. *De Reneville* [1948] P. 100, 110, and Harman J. in *Re Dewhirst* [1948] 1 All E.R. 147, 148.

[15] Section 1 (1) (*d*): s. 1 (2), hitherto s. 3 of the 1937 Act and s. 3 of the 1949 Act, states in what circumstances a person is to be deemed to be under care and treatment. See *Crutchfield* v. *Crutchfield* [1948] L.J.R. 99. On continuity of statutory period, see *Safford* v. *Safford* [1944] P. 61. See also Law Reform Act, 1949, s. 3.

[16] See footnote 12, *supra*. '*Furor impedit matrimonium contrahendum, sed non dirimit contractum*', Inst.Jur.Canon., lib. 2, tit. 12, Shelford *Marriage and Divorce*, p. 190, and note (n) thereat.

The contract of marriage is a 'very simple one which does not require a high degree of intelligence to comprehend'[17]: *omnia praesumuntur pro matrimonio*[18]: the onus of showing that a person did not understand,[19] or was incapable of understanding the nature of the ceremony lies on the person who impeaches its validity.[20] But the addition of fraud may lead to the annulment of a marriage contracted by a person of weak mind who is not a certified lunatic and is not, without that fraud, of unsound or defective mind within the ordinary meaning of the common law or of section 8 of the Act.[21]

One last point about section 8 (1) (*b*) is that by including 'recurrent fits of insanity or epilepsy' within its terms, it makes marriages contracted during a 'lucid interval' voidable. This provision covers the cases of non-certified lunatics only, for the marriage of a certified lunatic is void *ipso jure* regardless of any lucid interval.[22]

(b) *Intoxication, drugs, hypnotism.*

In this subsection, the non-existent mind is due not to the mental weakness of a party, as just discussed, but to an *ad hoc* and temporary interference with a person's ability to understand the marriage contract into which he or she enters.

A marriage contracted when one of the parties is in a state of intoxication is void.[23] Sir William Scott said that the result of a

[17] *Durham* v. *Durham* (1885) 10 P.D. 80, 81–2; *Cherktow* v. *Feinstein* [1929] 2 W.W.R. 257; 24 Alberta L.R. 188, affd. [1930] S.C.R. 335.

[18] See *Russell* v. *Att.-Gen.* [1949] P. 391; Sir William Scott in *Cresswell* v. *Cosins* (1815) 2 Phill.Ecc. 281; *Sullivan* v. *Oldacre* (1821) 3 Phill. 45, 55; Dr. Lushington in *Miles* v. *Chiltern* (1849) 1 Rob. 684, 693; *Harrod* v. *Harrod* (1854) 1 K. & J. 4, 8; *Wilkinson* v. *Payne* (1791) 4 Term 468.

[19] On non-comprehension of language used, see *Mehta* v. *Mehta* [1945] 2 All E.R. 690; and *Sobush* v. *Sobush* [1931] 2 W.W.R. 900 (Saskatchewan). On marriage of deaf and dumb, see *Harrod* v. *Harrod*, *loc. cit.*

[20] *Cannon* v. *Smalley* (1885) 10 P.D. 96, 98–9, *per* Sir James Hannen P. On schizophrenia, see *O'Neill* v. *O'Neill* [1945] 2 W.W.R. 396 (British Columbia).

[21] See *per* Sir John Nicoll, *Portsmouth* v. *Portsmouth* (1822) 1 Hag.Ecc. 355, 359: *Thaker* v. *Jennison* (1921) 61 D.L.R. 161 (British Columbia). But (where there is no fraud) a party only partially of unsound mind at time of marriage may well be capable of understanding the contract so that the marriage is valid, *Bell* v. *Johnston* [1946] 3 D.L.R. 310 (Saskatchewan), a case of *dementia praecox*; see footnote 10, *supra*.

[22] *Turner* v. *Meyers* (1808) 1 Hag.Con. 417. 'The remedy', said Sir William Scott, 'may be pursued at any time'. The possible 'validation' of such a marriage is discussed below. See *Browning* v. *Reane* (1812) 2 Phill.Ecc. 69, 70, citing *Blackstone* on validity of marriage of non-certified lunatic contracted in lucid interval: also Shelford, *Lunacy*, pp. 575, 582, *M'Adam* v. *Walker* (1813) 1 Dow H.L. 148, 178, where Lord Eldon refers to such a marriage which he had upheld. Where no lucid interval is proved, no decree is necessary, *Ex p. Turing* (1812) 1 Ves. & Bea. 140. In *Browning* v. *Reane*, the Commission examined a wife six months after the marriage and found her a lunatic for two years antecedent; held, in effect, that the marriage was void and not voidable, and that the putative husband had no right to administer her effects: Shelford, *Lunacy*, p. 582, also *Parker* v. *Parker* (1757) 2 Lee 382, where the result differed on the facts from *Browning* v. *Reane*, the marriage being upheld.

[23] *Sullivan* v. *Sullivan* (1818) 2 Hag.Con. 238, affirmed (1819) 3 Phill. 45, *sub nom. Sullivan* v. *Oldacre*.

conspiracy to intoxicate a person so as to persuade him, while still drunk, to go through a marriage ceremony, was a ' disability, natural or artificial, which created a want of reason or volition amounting to incapacity to consent '.[24] So in a Scottish case it was said of a woman that she was incapable at the time of marriage ' by reason of stupefaction occasioned by intoxication, of giving a rational consent, or of understanding what she did '.[25]

Marriages induced by the use of drugs, even when contracted by a party who has put himself under the influence of drugs, are in the same category as marriages celebrated when one or both of the parties are intoxicated. The same principles apply also to cases where one of the parties is hypnotised, and by that or some similar method is deprived of his capacity to consent.[26] These marriages would also seem to be *ipso jure* void and not capable of subsequent validation.[26]

(c) *Health.*

In these cases, the state of physical health of one of the parties prevents real consent from being given. The cases concerned with ' old-age ' marriages and with the doctrine of sincerity must be kept distinct.[27]

A French writer cites a case in the Cour de Paris in 1872 of annulment of a marriage contracted *in extremis* where apparent consent to a marriage which he had opposed all his life was snatched one-and-a-half hours before his death from a man with a cerebral haemorrhage.[28] A case of 1853 in Algiers was similarly decided : a man suffering from an apoplectic fit gave some semblance of consent to a marriage; he died the same day. This marriage was declared null and void. These decisions indicate the line which, it is suggested, would be taken by an English court in such circumstances, though neither French nor English law would annul

[24] At p. 246.

[25] *Johnston* v. *Brown* (1823) 2 Shaw & Dunlop, 495–96. In the *Law of Divorce in Canada* (1948), W. Kent Power criticises the Ontario decision, *Roblin* v. *Roblin* (1881) 28 Gr. (Up.Can.Ch.) 439, for suggesting that a marriage by an intoxicated person was voidable only and could be ratified or confirmed. (The headnote to this case is inaccurate in saying that the man ' was incapable of understanding what he was about ', as the facts stated at pp. 445–6 show. There was not a ' complete annihilation of will on the part of the defendant ', p. 446. It is made clear, p. 445, that the man ' was not too drunk to get married, supposing he was drunk at all '. The remarks that follow on ratifying and confirming a voidable marriage are *obiter.*) See also *Reid* v. *Aull* (1914) 32 O.L.R. 68 (Ontario). It may well be that a modern Court would not follow *Sullivan* v. *Sullivan*, but would prefer the reasoning of *Roblin* v. *Roblin* : see the next subsection on duress and force, where the metamorphosis from void to voidable seems already to have been effected.

[26] Wood Renton, *Lunacy* (1897) at p. 24, refers in connection with hypnotism to the *Czynski Case* (1894) *New York Medico-Legal Journal*, vol. 13, p. 51. As to whether these marriages are void or voidable, see the previous footnote.

[27] These are discussed below.

[28] Cangardel *Le Consentement des Epoux au Mariage* (Paris, Sirey, 1934), p. 17.

genuine *in extremis* cases, contracted for religious or other motives or purposes. An English case of 1370 has been referred to in order to demonstrate that at that date the sufficiency of death-bed marriages to legitimise the issue was not disputed by the secular courts.[29] In recent years, a Scottish court has upheld a marriage attacked because one of the parties was suffering from *paralysis agitans*.[30]

(d) *Duress and Force.*

In *Scott* v. *Sebright*,[31] Butt J. set out the principles which guide the courts in deciding cases where duress, fear and fraud are involved. 'The courts of law have always refused to recognise as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as any other contract'. The requirement of public policy that marriages should not be lightly set aside did not affect this principle, though great care was to be taken not to encourage collusive petitions. 'It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in the application to the facts of each particular case'.[32]

In *Scott* v. *Sebright*, Butt J. found that the woman had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion and threats which in her normal condition she would have treated with the contempt she must have felt for a man who made use of them. There was, therefore, no consent on her part as required by law.

Cases on duress depend entirely on their individual facts. Thus in *Cooper* v. *Crane*,[33] a girl of twenty-four who was, as found by

[29] See Hooper, *Law of Illegitimacy* (1911), p. 36, Pollock and Maitland, *History of English Law*, ii, 375. Cf. *M'Adam* v. *Walker* (1813) 1 Dow. H.L. 148, 178–9, where Lord Eldon mentions a case where a will by one confined till his death in a 'mad-house of the better sort' was upheld. Cf. *Smith* v. *Smith* [1948] 4 S.A.L.R. 61 (Natal P.D.) at p. 66, where Selke J., having said that 'a marriage is vitiated if consent is lacking', gave as an instance incapacity due to disease: but he seems to have had mental disease in mind.

[30] *Dunn* v. *Dunn* [1930] S.C. 131.

[31] (1886) 12 P.D. 21: see references cited there at p. 23; also Sir Frederick Pollock's comment (1887) 3 L.Q.R. 252.

[32] At pp. 23–4. Cited with approval by Henn Collins J. in *Hussein* v. *Hussein* [1938] P. 159, 160, a case on duress and threats.

[33] [1891] P. 369, 378.

the court, weak and impressionable, consented to marry a man of twenty-one on his threats that if she did not marry him he would blow his brains out. The marriage was not consummated, the man's only interest in the affair being the petitioner's money. Collins J. held that she was not under a misapprehension as to the full nature and legal consequences of the ceremony. There was not terror, nor was her mind paralysed. ' The principles which regulate the validity of solemn contracts must not be strained to meet hard cases, least of all when the contract in question is one of marriage '. It is not easy to see where the distinction lies between the facts of this case and those envisaged by Butt J. in *Scott* v. *Sebright* where he speaks of ' natural weakness of intellect ' or ' fear—whether reasonably entertained or not ' resulting in ' a state of mental incompetence to resist pressure improperly brought to bear '. Similar facts to those in *Cooper* v. *Crane* brought about a different decision in a later case.[34]

In the nature of things, there are not likely to be many marriages brought about by force. The first modern English case on force *simpliciter* seems to be that of *Roger Fulwood* who ' violently, and with force, and against the will of (one) Sarah, took and carried the said Sarah to St. Saviour's, and there married her ', his object being not love but ' lucre of the gain '. The court laid it down that, on indictment for forcible marriage, it is no excuse that the woman first consented if afterwards she refused and was forced through the ceremony against her will.[35] In *Wharton's Case* it was said that even if a girl consents at the wedding ceremony itself, if she was originally taken away by force she does not have the liberty of expressing her own free will, especially as she is without the advice and sustenance of her friends.[36] And if there is a fiduciary relationship between the parties, as between guardian and ward, the court would look askance at a marriage contracted between them if the lady was of a ' very tender age ', especially where force, physical or mental, is alleged.[37] In *Miss Turner's Case*,[38] Gibbon Wakefield (who became a pioneer in the development of New Zealand as a result of being transported there for his part in the affair) told the girl in question that her father was on the eve of

[34] *Bartlett* v. *Rice* (1894) 72 L.T. 122. Cf. *Lange* v. *Lange*, footnote 10, *supra*.

[35] (1638) Cro.Car. 482, at p. 484: also see pp. 488, 493. Fulwood's counsel argued that he *agreed* that the marriage was void because of Fulwood's wrongful acts, that therefore the indictment for forcible marriage was invalid because there was no marriage. The court held that though ' this was not a marriage *de jure* . . . yet it is a marriage *de facto*, and felony within the statute ' (p. 493). See argument to the same effect and with the same result, *R.* v. *Rahman* [1949] 2 All E.R. 165: also Matrimonial Causes (War Marriages) Act, 1944, 7 & 8 Geo. 6, c. 43, s. 5 (1), ' *marriage* includes a purported marriage which was void *ab initio* '.

[36] (1690) 10 Commons Journals, 14 Lords Journals, 538, 585, 591; referred to (1848) 2 H.L.C. at p. 58.

[37] *Harford* v. *Morris* (1776) 2 Hag.Con. 423.

[38] 2 Lewin C.C. 1; see (1848) 2 H.L.C. 61–62.

bankruptcy, and that this disastrous fate with its consequent total ruin could only be avoided by a marriage between themselves. The marriage was annulled by Parliament, though there had been no physical compulsion, no threat of personal injury to anyone, no bodily fear. This case is usually put in the category of duress, though it might have been considered as one induced by fraud. But the court will not easily be persuaded that a marriage has been brought about by force. In *Field's Annulling Bill*, a girl of eighteen was induced, after she had once withdrawn a promise to that effect, to marry a man of fifty-two. The ceremony took place without the knowledge of her friends, the man making a false statement of the girl's age and residence both in the publication of the banns and in the register of marriage. There was no cohabitation or consummation, and within a few days the girl set in motion process to annul the marriage. The House of Lords said that the facts were 'not such as would justify us in holding that that which appears to be a consent was so far influenced by fear or the continuance of any persecution, as to justify the legislature interfering . . . to render void the contract which has been solemnised in the face of the church and is binding in law'.[39]

In ecclesiastical law, 'matrimony contracted through any menace or impression of fear is null and void *ipso jure* . . .'.[40] Such a marriage could not be 'accepted' by the parties: consent given after the marriage ceremony did not relate back.[41] But this view has been rejected by some courts. It has been held in Saskatchewan that a marriage contracted under duress was only voidable, and so could be ratified.[42] Force and duress are analysed in the same way. The problem has never come squarely before the English courts, but United States decisions are to the effect that force should make a marriage voidable only.[43] The matter has been fairly stated in the South African case, *Smith* v. *Smith*,[44] a case on fear and duress inducing a marriage, where Selke J. said :

'I take it—but the point was not specifically raised or debated before us—that the legal position in cases of this kind is that unless and until the court declares the purported marriage a nullity, the union must be regarded as a valid one. Seeing, therefore, that there is nothing to compel a person in the position of the present plaintiff to take steps to have the union declared null and void, it

[39] (1848) 2 H.L.C. 48, 72, *per* the Earl of Devon. Cf. *Wortham's Case*, reported (1848) 2 H.L.C. 73; 76 Lords Journals, 76, 96, 303. *Hussein* v. *Hussein* [1938] P. 159, is a case on duress, but affords no analysis of this concept.

[40] Ayliffe *Parergon Juris Canonici*, p. 361, cited in *Moss* v. *Moss* [1897] P. 263, 271.

[41] Cf. *Knight's Case* (1697) 12 Commons Journals, 16 Lords Journals, 146, 148, 149: see (1848) 2 H.L.C. 48, 59, where consent at the time of the ceremony and re-affirmed afterwards was held not to be sufficient for the marriage of a girl of 12 or 13. Since 1929, the minimum age of marriage is 16.

[42] *Kawaluk* v. *Kawaluk* [1927] 3 D.L.R. 493, 496 (Sask.).

[43] See cases on fraud, discussed in the following paragraphs.

[44] [1948] 4 S.A.L.R. 61, 67–68 (Natal P.D.).

seems to follow that such a person could, by conduct consequent to the ceremony, in effect affirm or acquiesce in the union. That looks as though the proper view is that such a union is voidable, and not *ipso jure* void, although I do not know that that appears clearly from the common law authorities '.[45] While the effect of force and duress annulling a marriage is at present in a transition stage in English law, there appears no doubt that a marriage induced by a fraudulent misrepresentation is voidable and may be ratified by the defrauded party.[46] An analysis of the cases in which fraud appears makes it fairly clear that fraud is not a ground of annulment as such, but is rather a species of the wider genus ' mistake '. However, there are many judicial dicta in which fraud is spoken of as a separate cause of nullity. One may with advantage refer to the Kentucky case of *Shepherd* v. *Shepherd*,[47] where Hurt J. said :—

' A marriage procured by fraud or duress is not absolutely void for all purposes, but it can only be declared so at the option of the injured party, since all of the authorities are to the effect that it may be ratified or affirmed by the injured party by the exercise of marital rights after constraint has been removed. Furthermore, to have such a marriage dissolved or declared null is a privilege personal to the injured party, and cannot be effected by the heirs of such party, or by any third party, or by the party in fault. For, as said by this court in *Tomppert's Executor* v. *Tomppert*,[48] with reference to a marriage alleged to be void because of having been procured by fraud : " If a marriage procured by fraud is void, the most unjust and absurd consequences would follow. A void marriage is incapable of ratification. It is as if no pretended marriage existed; neither party is bound, the guilty and the innocent are alike at liberty to disregard it . . ." '. This passage might well represent the law of England.

### Abuse of, or Mistake as to the Nature of the Ceremony

(a) *Sham marriages.*

Here the parties go through a ceremony of marriage for some purpose other than that of creating a true marriage. Purely formal adhesion is given to an act which one or both of the parties regard as fictitious and simulated. The marriage might be performed

[45] The learned judge assumed in favour of the respondent that the marriage was only voidable, but he found that it had not been affirmed, as the respondent alleged.

[46] See Pollock (1887) 3 L.Q.R. 252. Also Logie J. in *Vamvakidis* v. *Kirkoff* (1929) 64 O.L.R. 585, 586 (Ontario).

[47] (1919) 192 S.W. 658, 659; 174 Ky. 615 (Kentucky). See also *McCullen* v. *McCullen* (1914) 147 N.Y.S. 1069, 1071; and *Merrell* v. *Moore* (1907) 104 S.W. 514, 517, col. 1; 74 Tex.Civ.App. 200, where it is suggested that a marriage obtained by duress could be ratified.

[48] 13 Bush 326. 26 Am.Rep. 197.

as a result of a dare,[49] or solely to win a bet,[50] to obtain an engagement open only to married persons,[51] to fulfil a promise made to a dying person,[52] to comply with the terms of a settlement conferring gifts subject to the beneficiary's marriage,[53] and so on. Marriages have been celebrated solely in order to avoid military call-up,[54] in one case it seems in order to avoid a court-martial.[55]

English law, subject to public policy considerations, discussed below, does not acknowledge the concept of sham marriages: once a valid marriage is completed, the mental reservations of one or both of the parties to it will not be considered.[56] There are numerous examples of marriages contracted by putative fathers desiring either to be saved from committal to prison, under bastardy laws, or to obtain their release after imprisonment has taken place. As was said in an Irish case, there is no basis for a petition of nullity in these cases unless force or grave fear is present: it must be so compelling that marriage is the only alternative in order to liberate oneself from it.[57] In a New Brunswick case, a coloured Barbados sailor was arrested on a false bastardy charge. He married the complainant in order to get his release and so return to his ship which was about to sail. It was held that he was so frightened and oppressed by the calamity that there was not a real consent.[58] But in Scottish law, where a

[49] Contrast the two American cases, *Davis* v. *Davis* (1934) 175 A. 574, 119 Connecticut 194, following *McClurg* v. *Terry* (1870) 21 N.J.Eq. 225, where 'a mere jest got up in the exuberance of spirits to amuse the company and themselves' and not followed by consummation or cohabitation, was held to be no marriage, with *Brooks-Bischoffberger* v. *Brooks-Bischoffberger* (1930) 149 Atl. 606, 129 Me. 52 (Maine); in this latter case a marriage performed through the dare of a third party was held to be valid, for, said Dunn J., at p. 607, 'marriage is a status wherein public policy rises superior to mere sympathy'. Cf. *Warren* v. *Warren* (1923) 199 N.Y.S. 856, 858.

[50] See *Parker* v. *Parker* (1757) 2 Lee 382.

[51] See the New York case of *Dorgeloh* v. *Murtha*, referred to in *Crouch* v. *Wartenberg* (1920) 104 S.E. 117, 119, col. 1, where a marriage certificate was required to enable a woman to get a theatrical engagement.

[52] Cf. New York case, *Coppo* v. *Coppo* (1937) 297 N.Y.S. 744; 163 Misc. 249.

[53] A French court refused to annul a marriage contracted for this purpose alone, but somewhat illogically held that the provision of the pecuniary clause had not been complied with: Cangardel, *op. cit.*, p. 15.

[54] Case heard in Lyon, April 10, 1856; D. 57.2.54. Cf. *Small* v. *Small* (1923) 67 Sol.J. 277, where banns of marriage were put up in an assumed name, to the knowledge of both parties, to avoid arrest for desertion. Duke P. held that 'the ceremony of marriage was a nullity' because contrary to s. 22 of the Marriage Act, 1823: also *R.* v. *Burton-on-Trent* (1815) 3 M. & S. 537.

[55] *De Moulin* v. *Druitt* (1860) 13 Ir.C.L.Rep. 212, a woman was found aboard a troop-ship proceeding from Cork to New South Wales. The officer in command thought 'it right that a marriage should take place between her and the private Burns; and, accordingly, by command of Colonel Erskine, a marriage between the woman and the private soldier took place . . .', p. 219. (But Fitzgerald J., p. 235, speaks of a marriage 'by consent'.) The marriage was held void not on this ground, but on the ground that no clergyman of the Established Church was present to perform it.

[56] *Bell* v. *Graham* (1859) 13 Moo.P.C. 242, references p. 258. For temporary or trial marriages, see Falconbridge, *Conflict of Laws*, p. 651.

[57] *Griffith* v. *Griffith* [1944] 1 Ir.R. 35, 42–43, 52.

[58] *Hinds* v. *McDonald* [1932] 1 D.L.R. 96. Cf. New York decision in *Jackson* v. *Winne* (1831) 7 Wendell 47; 22 Am.Dec. 563, where the fact that a putative

marriage by oral consent *de præsenti* was possible until July, 1940, it was said that the mere form of the ceremony is only conclusive if the parties who acknowledge one another to be man and wife do so 'with the real and present purpose of becoming spouses. . . In the case of a ceremony being proved, but a doubt remaining *quo animo* it was gone through, it is competent to inquire into the subsequent conduct of the parties towards each other'.[59] On the other hand, Scottish courts have held that a marriage may come into being even though there was no intention of marriage when cohabitation began[60]: but the matrimonial intention must appear at some time.[61]

English courts will not take note of the mental reservation of a party contracting a marriage as to the desired legal effect of the ceremony.[62] In a Pennsylvanian case, a marriage was contracted in order to obtain release from a debt.[63] Read J., for the court, approved[64] of Lord Redesdale's words in *M'Adam* v. *Walker*[65]: 'There was no proof that Mr. M'Adam did not intend a *consortium vitae* at the time of the marriage, and even though he had not that intention, still it was not to be allowed that a civil contract (as this was by the law of Scotland) should be avoided by a secret reservation of one of the parties'. The marriage

father was under arrest was held insufficient to avoid the marriage on grounds of duress, Dig.L.50, tit. 17, s. 30, '*Nuptias non concubitus sed consensus facit*', was cited in support: 'the necessary consequence of his marriage was a discharge from any liability to (the overseers of the poor, the persons responsible for his arrest)', p. 51.

59 *Per* Lord Watson, *Dysart Peerage Case* (1881) 6 App.Cas. 489, 537; see also *per* Lord Sands, *Dunn* v. *Dunn*, 1930 S.C. 131, 151–2. 'By the law of Scotland the duly attested exchange of consent constituted very marriage. There is no room for repentance'. Also *Duran* v. *Duran* (1904) 7 F. 87. See Marriage (Scotland) Act, 1939, 2 & 3 Geo. 5, c. 34, s. 5 (brought in operation by a Commencement Order, 1940) whereby two of the three modes of contracting an irregular marriage in Scotland, *viz.*, by declaration *de praesenti* and by promise *subsequenti copula* are abolished. The fact that the third mode (cohabitation with repute) may begin with an initially adulterous association does not prevent a marriage coming into being when the parties are free to marry, *Campbell* v. *Campbell* (1867) 5 M.(H.L.) 115, *De Thoren* v. *Wall* (1876) 3 R.(H.L.) 28.

60 *Hendry* v. *Lord Advocate*, 1930 S.C. 1027.

61 *Bairner* v. *Fels*, 1931 S.C. 674. See generally Gloag & Henderson, *Introduction to the Law of Scotland* (4th ed., 1946), p. 574.

62 Parties may agree to live apart *after* they are married, and they may bind themselves not to sue for restitution of conjugal rights during the period of their separation, *Marshall* v. *Marshall* (1879) 5 P.D. 19, 23, *Wilson* v. *Wilson* (1848) 1 H.L.C. 538; 5 H.L.C. 40. But an agreement to live apart made *before* marriage is a 'bargain about an event which they are not entitled to anticipate', *Marlborough* v. *Marlborough* [1901] 1 Ch. 165, 171, distinguished in *Re Williams* [1929] 2 Ch. 361. A pre-marriage agreement to live apart cannot be subsequently ratified, *Brodie* v. *Brodie* [1917] P. 271; *Hudston* v. *Hudston* (1922) 39 T.L.R. 108, 111. See also *Dagg* v. *Dagg* (1882) 7 P.D. 17. Cf. *U. S.* v. *Rubinstein* (1945) 151 F. 2d. 915, 918–19; 326 U.S. 766, *infra*. *Conley* v. *Conley* (1944) 14 Ohio Supp. 22; *Kemsies* v. *Field* [1946] Quebec S.C. 232 (mariage simulé). See also *Aldridge* v. *Aldridge* (1888) 13 P.D. 210.

63 *Barnett* v. *Kimmell* (1859) Pa. (11 Casey) 13.

64 At p. 20.

65 1 Dow H.L. at p. 190.

was therefore valid. And Langton J. has said, in considering the doctrine of sincerity, that it is irrevelant to take into account '. . . the motives which prompted (a party) to enter into the marriage'.[66]

English courts have not been faced with disputes as to the validity of marriages contracted solely to acquire British nationality or, now, United Kingdom citizenship: indeed, after the British Nationality Act, 1948, a foreign woman does not, by United Kingdom law, automatically acquire British nationality by marriage to a man already possessed of it.[67] But the judges of most immigration countries have had to face the problem whether such a marriage is a valid marriage.

In one case in Palestine, then a mandated territory, a woman who had entered Palestine on a false passport, claimed the cancellation of a deportation order made against her, on the ground of her marriage, while in detention, to a Palestinian subject. Frumkin J. held that a marriage in prison with no other object than to evade the immigration quotas was 'nothing but a disgraceful fiction of a marriage'.[68] But in another case, it was held that evasion of the immigration laws did not make a marriage fictitious or genuine[69]: this would seem to be the better reasoning.

In Germany, marriages for the sole purpose of procuring a name for a woman or to give her German nationality were declared void by statute: in Switzerland similar rules have been adopted in a Federal Act.[70] In two Swiss cases a woman, German before her marriage to a Swiss citizen, failed to set up successfully her acquired nationality on being threatened with deportation, the *ratio decidendi* in each case being that the woman had not intended permanent marital community.[71] In 1940, the Swiss Federal Council authorised the Department of Justice to annul nationality acquired by such marriages.

The United States have also reacted against sham marriages designed to facilitate immigration. A Federal Act of May 14, 1937, simply orders deportation.[72] In a New York case in 1946, it was held that a marriage in New York of an alien to a citizen in order to convert temporary into permanent permission to stay

[66] *Nash* v. *Nash* [1940] P. 60, 64.
[67] 11 & 12 Geo. 6, c. 56, s. 1. But British nationality might be automatically acquired, through marriage, by the citizenship laws of a Commonwealth country, see Cmd. 7326 (1949) cl. 19 (3), and s. 6 (2) of the Act of 1948.
[68] H.C. 1/37 [1937] S.C.J. 405; cited in *The Jewish Law of Family and Inheritance and its Application in Palestine*, E. E. Scheftelowitz (Tel Aviv), p. 65.
[69] *The Battat Case*, C.A. 36/37 [1937] S.C.J. (N.S.) 185, 1 Ct.L.R. (N.S.) 66; Scheftelowitz, *op. cit.*, 66; cf. *Personal Status in Palestine* (Tel Aviv, 1947) E. Vitta, 88. Cf. *Ludmirer* v. *Cohen* [1943] S.C.D.C. 212 (District Ct. of Tel Aviv); S.C.D.C. 148; C.C. 85/42, 204/43, Scheftelowitz, *op. cit.*, 66–67. Also see *Att.-Gen.* v. *Menkes* (1943) 10 L.R. of Pal. 14, C.A., and *Polsky* v. *Att.-Gen.* (1943) 10 L.R. of Pal. 67 C.A.
[70] Rabel, *Conflict of Laws, a Comparative Study*, 1, 273.
[71] Rabel, *op. cit.*, 273, n. 130.
[72] Rabel, *op. cit.*, 273.

in the country, the parties agreeing not to live together and to obtain a divorce within six months, was not a marriage, there being no consent thereto. The facts of this case are very strong, bringing into operation not only immigration policy but also general public policy with respect to the formation of marriages. Learned Hand J. said [73] that the parties ' were never married at all. Mutual consent is necessary to every contract : and no matter what forms or ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which must always be proved. . . . Marriage is no exception to this rule; a marriage in jest is not a marriage at all . . . . It is quite true that a marriage without subsequent consummation will be valid; but if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others '. English public policy would, it is submitted, take the same view in a similar case.[74] But it is not always easy to envisage the court's attitude, as for example on the facts of a case which came before the Civil Tribunal of Grenobles in 1923. When Turkey entered the 1914 World War, a French woman, living in Turkey, wishing to avoid internment as an alien enemy, married a citizen of a neutral country. After the war she petitioned for a decree of annulment on the ground that she had never had the intention of contracting a marriage. She was successful. The court, stressing the fact that the marriage had not been consummated (a fact not material in civil law), said that the consent had been vitiated by moral violence.[75]

Lastly under this heading are the cases of a ' mock marriage in a masquerade (where) . . . there would be no fraud, but for want of real consent the marriage would be declared void '.[76] This contention is not based on mistake of identity,[77] but on absence of real consent to a marriage.[78]

Sham marriages in English law are void *ipso jure*, being, where so found, against public policy. No question of their validation should be entertained. On the other hand, marriages contracted

[73] *U. S.* v. *Rubinstein*, at pp. 918–19, footnote 62, *supra*.
[74] See footnote 62, *supra*.
[75] See Cangardel, *op. cit.*, 16.
[76] *Per* Sir Francis Jeune P., *Moss* v. *Moss* (1897) P. 263, 269.
[77] Mistake of identity is dealt with under a different grouping below. See *R.* v. *Millis* (1844) 10 Cl. & Fin. 534, 785, where Lord Campbell refers to ' marriages in a masquerade, where the parties were entirely mistaken as to the persons with whom they are united . . . '. They ' would hardly be supported in the Ecclesiastical Court, in a suit of jactitation, or for restitution of conjugal rights '.
[78] Cf. the ' dare ' cases, footnote 49, *supra*.

simply to give a child of the parties, born before their marriage, the status of legitimacy under the Legitimacy Act, 1926, were and are perfectly valid; this even if the parties do no more than just go through a ceremony of marriage and part immediately afterwards.[79]

(b) *Mistake as to the nature of the ceremony.*

English courts will annul a marriage, if at the time of the celebration, there is a mistake in the mind of one or both of the parties, as to the true nature of the ceremony. In *Szapira* v. *Szapira*,[80] a register office ceremony was regarded by the petitioner as a formality stating intention to marry at a future date: so, too, *Hall* v. *Hall*,[81] *Kelly* v. *Kelly*,[82] and *Valier* v. *Valier*.[83] In *Valier* v. *Valier*, as in the South African case *Kanatopsky* v. *Kanatopsky*,[84] it was suggested that these marriages could be ratified. Only voidable marriages may be ratified, but it is not at all clear that there is universal agreement that the type of mistake now being considered makes a marriage voidable only: indeed, the usual view is that such a marriage is void *ipso jure*.[85]

In *Mehta* v. *Mehta*,[86] a domiciled Englishwoman agreed to be converted to the Hindu faith. The ceremony, which was in Hindustani, a language she could not understand, was also one of marriage according to the rites of the sect to which her 'husband' belonged. On the facts, Barnard J. was satisfied that 'she never had any intention to marry this man, that the ceremony she went through was merely a fraud perpetrated on her by the respondent': she was entitled to a decree of annulment.

The modern law would seem to be that a mistake as to the nature of a ceremony makes a marriage voidable only. If, when the full facts are known, a party chooses to ratify such a marriage, it will stand. And once one of the parties to the marriage dies, a voidable marriage can never be put in issue.

[79] Questions of desertion might arise in these cases, with consequential matrimonial remedies for the deserted party: *De Laubenque* v. *De Laubenque* (1899) P. 42; *Buckmaster* v. *Buckmaster* (1869) L.R. 1 P. & D. 713; *Lee Shires* v. *Lee Shires* (1910) 54 Sol.J. 874; *Fassbender* v. *Fassbender* [1938] 3 All E.R. 389. Again, quite apart from the question of desertion, which might afford the remedy of dissolution, the marriage might be annulled, not on the ground of lack of consent, but on that of wilful refusal to consummate the marriage: see *Treby* v. *Treby* (1939) 87 L.J.Newsp. 77; and *Dredge* v. *Dredge* (1947) 63 T.L.R. 113.

[80] See 24 T.L.R. 757, col. 2.

[81] (1908) 24 T.L.R. 756.

[82] (1933) 49 T.L.R. 99; cf. *Lindo* v. *Belisario* (1795) 1 Hag.Con. 216; *Ussher* v. *Ussher* [1912] 2 Ir.R. 445, 49 T.L.R. at p. 100.

[83] (1925) 133 L.T. 830; see also *Way* v. *Way* [1949] 2 All E.R. 959, 963.

[84] [1935] E.D.L. 308. At 314, Gutsche J. said: 'Where sexual intercourse follows the marriage ceremony, the plaintiff would be met with an almost insuperable obstacle'. See also *Rubens* v. *Rubens* (1908) 26 S.C. (Cape of Good Hope) 617, 619.

[85] See Cheshire, *Private International Law*, pp. 435, 448, n. 2.

[86] [1945] 2 All E.R. 690.

(c) *Mistake as to the effect of a ceremony.*

In this category there are two lines of approach. There are those marriages in which the parties go through what they know to be a ceremony of marriage but are under a mistaken impression as to what its legal effects will be. There are those marriages which the parties do not intend to become effective until something else, usually a religious or other ceremony, has been performed.

Two Scottish cases show how the courts there have wavered in decisions on mistake at to the effect of a ceremony. In *Lendrum* v. *Chakravarti*,[87] a marriage was celebrated in Scotland between a Scotswoman and a Hindu domiciled in 'India'. Both parties believed, wrongly it transpired, that the marriage was valid by the *lex domicilii* of the husband. Lord Mackay held that there was no *consensus ad idem*, the woman being under an essential error induced by the man, though there had been no fraud. The wife thought that the marriage would be valid in India, as well as in Scotland. Here 'the parties differed fatally as to what they contracted.'[88] In *MacDougall* v. *Chitnavis*,[89] *Lendrum's Case* was, on the point now under discussion, overruled. A woman who consents to a marriage with an 'Indian' whose personal law will not recognise that marriage though this is unknown to her at the time of the marriage, cannot afterwards complain that she has given no consent to the marriage. 'If two parties, each with the requisite capacity, enter into marriage in Scotland,[90] that can only be on the footing that they intend to enter into a marriage which confers on the woman the status of a lawful wife. . . . If the parties seriously intend the marriage, it is, apart from questions of capacity, impossible to hold that the marriage is null from the absence of consent.'

It is submitted that the *ratio decidendi* of *MacDougall* v. *Chitnavis* would be accepted in England. This submission is borne out by *Way* v. *Way*,[91] where Hodson J. turned down a submission that certain marriages, contracted within the Soviet Union, were invalid because the husband celebrated them in the mistaken belief (a) that the Soviet administrative practice of granting permission to wives of foreigners to leave the Soviet Union would continue as it had done before the marriages took place; (b) that the husbands would be permitted to go and see their wives after they had parted from them; (c) that the marriages entered into imposed a duty on the spouses to live together. Hodson J. said that there was no authority in English law for propositions (a)

[87] [1929] S.L.T. 96: see also *Vamvakidis* v. *Kirkoff* (1929) 64 O.L.R. 585 (Ontario).
[88] [1929] S.L.T. at p. 105.
[89] [1937] S.C. 390, 402.
[90] Or England.
[91] [1949] 2 All E.R. 959.

and (b). As for (c), that depended on Soviet law, since English law recognised that the duties imposed on spouses varied according to their respective domiciles, and by section 9 of the Soviet Code, no duty to cohabit existed.[92]

The second line of cases under this heading is one in which considerations of public policy inevitably intervene. *A* obtains a promise of marriage from *B* on the undertaking that the parties will, after a civil ceremony of marriage, go through a religious ceremony in addition. For Roman Catholics and Jews, *inter alia*, this undertaking is of paramount importance. It has to be remembered also that in countries such as France and Belgium, a civil ceremony is the only recognised form of marriage.[93] In 1847, a Montpelier court held that a refusal by the respondent to adhere to a promise, made before the celebration of a civil marriage, to go through a religious ceremony, was no ground of annulment, though refusal might afford ground for divorce or judicial separation, on the footing of being an '*injure grave*'.[94] A New York decision would seem to go the other way. In *Antonelli* v. *Antonelli*,[95] Rosenmann J. found for nullity of such a marriage, rejecting a plea that it had been ratified. 'Although I believe that there was consummation of the marriage, there was none after the discovery by the plaintiff that no religious ceremony was going to be entered into by the defendant.'

In the Northern Irish case of *Gordon* v. *Gordon*,[96] it seems not to have been pleaded that a civil ceremony of marriage could be invalidated if a promise to go through a religious ceremony after the civil contract was not kept. This petition for annulment was founded on the novel assertion that refusal to go through the religious ceremony amounted to wilful refusal to consummate the marriage, for by Jewish law the parties would not consummate the marriage until the religious ceremony had been performed. Andrews L.C.J., somewhat regretfully in the circumstances of the case, held that the petitioner failed because there was no refusal in the sense of a definite decision come to without just excuse. In the premises, since, without the religious ceremony, the parties will not live together, it would seem best to follow the line of *Antonelli* v. *Antonelli* in such cases.

Wilful refusal to consummate a marriage was not a ground of annulment by English law until the Matrimonial Causes Act, 1937.[97]

[92] At pp. 963–64. Overruled on other points *sub nom. Kenward* v. *Kenward* [1950] 2 All E.R. 297: see at p. 304: also comment on *Kenward's Case* in this volume of the *Modern Law Review*.

[93] See Wolff, *op. cit.*, p. 345 ff.

[94] Cangardel, *op. cit.*, p. 37.

[95] Referred to in *Coppo* v. *Coppo* (1937) 297 N.Y.S. 744, 753; 163 Misc. 249, reported in N.Y.Law Jo., February 16, 1937.

[96] [1948] N.I. 174.

[97] Section 7 (1) (*a*), now s. 8 (1) (*a*) of the 1950 Act. See *Napier* v. *Napier* [1915] P. 65; followed in *Barnes* v. *Barnes* (1921) 63 D.L.R. 680 (Saskatchewan).

Even now the term is strictly limited. Consummation in its legal sense has been defined by Lord Jowitt L.C. for the House of Lords, but his Lordship has also expressed the view that a definition of ' wilful refusal ' was undesirable.[98]

### Mistake or Error as to the Person

The classical statement on this section is to be found in Ayliffe's *Parergon Juris Canonici*.[99] After stating that matrimony should be contracted with absolute freedom and liberty of consent, since the parties' consent is ' sufficient alone ' to establish a marriage, the learned writer considers the kind of errors which, according to the canon law, impeach or hinder ' a matrimonial consent and renders it null and void *ab initio* '. The first species of error is *error personae*, ' as when I have thoughts of marrying Ursula ; yet by mistake of the person I have marry'd Isabella. For an error of this kind is not only an impediment to the marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting. For deceit is oftentimes wont to intervene in this case ; which ought not to be of any advantage to the person deceiving another '. The second species is *error of condition* ; ' as when I think to marry a free woman, and through a mistake I have contracted wedlock with a bondwoman and so vice versa '. Even in Ayliffe's day, as he acknowledged, this kind of error was obsolete. Next comes *error fortunae*, as when ' I think to marry a rich wife and in truth have contracted a marriage with a poor one '. Such an error only annuls a marriage, in Ayliffe's view, where the possession of riches is made a specific condition of the marriage. Lastly, there is *error of quality*, ' as when a man marries Berta believing her to be a chaste virgin, or a noble family and the like, and afterwards finds her to be a person deflower'd or of a mean parentage '. According to the common opinion of the ecclesiastics, ' matrimony celebrated under such kind of error, in point of consent, is deem'd to be simply voluntary as to the nature and substance of it, though in respect of the accidents 'tis not voluntary '. This kind of marriage is valid.

The law has changed since Ayliffe's day. Ayliffe states that error as to the identity of the person whom one marries is a ground of annulment. Error of identity is not easy to define, nor is it easy to state its limits.[1] In *Wilson* v. *Horn*,[2] a Scots case, a racing tipster, the son of a postilion, passed under an assumed name and

[98] See *Baxter* v. *Baxter* [1948] A.C. 274 and *Horton* v. *Horton* (1948) 64 T.L.R. 62 ; cf. *Gordon* v. *Gordon, supra.*

[99] At p. 361 ; cited in *Moss* v. *Moss* [1897] P. 263, 271–72 ; cf. Palles C.B., in *Ussher* v. *Ussher* [1912] 2 Ir.R. at p. 504.

[1] On ' Mistake as to party in the Law of Contract ', see Glanville L. Williams [1945] 23 Can.Bar Rev. 271, 380.

[2] (1904) 41 S.L.Rep. 312.

represented himself to be a landed proprietor in Ireland, with substantial means and prospects: he was in fact an absconding bankrupt. A lady with whom he entered into marriage was given a decree of annulment on the ground of false and fraudulent misrepresentations.[3] Another case of so-called *error personae* is the Australian case, *Allardyce* v. *Mitchell*,[4] where J. M. passed himself off as J. G. with whose family the petitioner was acquainted. If she had known nothing of the family she would not have consented. Sir William Foster Stawell C.J. said: 'Here, it is not merely a mistake of name, it is actually a mistake of identity'. 'There was no contract; the parties were not *ad idem*; there was no *consensus*; the two minds were not at the same point'. But when is a mistake of name a mistake of identity? A New Zealand judge, referring to Stawell C.J.'s judgment, was prepared to say that mistake of identity only occurred where the petitioner's true consent was to marry B but she married C who impersonated B.[5]

Questions of identity often occur in cases dealing with false names given on marriage by licence or by banns. In *R.* v. *Burton-on-Trent*,[6] a marriage by licence was celebrated not in the man's real name but in the name which he assumed after desertion from the army. Lord Ellenborough stated that the crucial test in these cases was whether the name was adopted in order to conceal identity from the other party to the marriage, or, as in this case, for some other purpose which had nothing to do with the marriage. Le Blanc J., who agreed that the marriage was valid, summed up the issue by saying that the marriage was 'not with a view to impose upon a woman whom he married'.[7]

If a party gives consent 'to marry the human being to whom she was married', fraud as to status, fortune and prospects does not avoid it: this was the New Zealand decision in *C.* v. *C.*[8] Only a mistake as to the persona of the person who takes part in the ceremony, as where C impersonates B, justifies annulment. These cases present many difficulties: while comparatively easy of solution where the mistake is induced by the fraud of one of the parties, doubts arise where the error is honest on both sides; this matter will be raised again in discussing the 'concealed pregnancy' cases. But one can be certain that English courts would not follow the decision of the French court which annulled the marriage of a Frenchwoman to a man who claimed to be Alsatian by birth, but

[3] Was this not rather a case of *error fortunae*, or perhaps a modern version of *error conditionis*?
[4] (1869) 6 W.W. & A.'B. (Ins., Ecc. & Mat.) 45 (Australia).
[5] *C.* v. *C.* [1942] N.Z.L.R. 356.
[6] (1815) 3 M. & S. 537.
[7] On mistake of identity, see also *R.* v. *Millis*, footnote 77, supra. On delusions as to one's own persona, *Forster* v. *Forster* (1923) 39 T.L.R. 658.
[8] At p. 358, *supra*, footnote 5.

who was in fact of German origin.[9] Nor would an English court dissent, it is thought, from the obiter dictum in a South African case, where it was said that a marriage could not be annulled on the ground that the defendant had fraudulently concealed from the petitioner the fact that he was an apostate from the Jewish faith,[10] though this would be a border-line issue.

The classic cases on mistake or error as to the person are not those on mistake of identity, but the concealed pregnancy cases, cases in which fraud is usually of paramount importance.[11] The matter is now dealt with to some extent by statute in English law, the Matrimonial Causes Act, 1937, providing that a marriage shall be voidable if the respondent at the time of the marriage was pregnant by some person other than the petitioner,[12] or was suffering from venereal disease in a communicable form.[13] Before the

[9] (1919) 45 Clunet 666; 36 South African Law Journal 171: the date of the marriage, August 24, 1918, is significant; *aliter* if France and Germany had been friendly Powers?

[10] *Rubens* v. *Rubens* (1908) 26 S.C. (Good Hope) 617. (Relief granted on different ground.)

[11] American decisions on fraud and misrepresentations inducing marriages are not without interest. An extensive summary is cited from *Coppo* v. *Coppo* (1937) 297 N.Y.S. 744, 750–51; 163 Misc. 249: 'Various frauds are recognised by the courts as constituting ample grounds for annulling the marriage. In *Shonfeld* v. *Shonfeld*, 260 N.Y. 477, 184 N.E. 69, misrepresentation of the defendant as to financial responsibility; *Robert* v. *Robert*, 87 Misc. 629, 150 N.Y.S. 366, failure to keep promise to go into hotel business after marriage; *Di Lorenzo* v. *Di Lorenzo*, 174 N.Y. 467, 67 N.E. 63, 63 L.R.A. 92, 95 Am.St.Rep. 609, as to parenthood of child born shortly before the marriage. *Domschke* v. *Domschke*, 138 App.Div. 454, 122 N.Y.S. 892, chastity of wife before marriage; *Blank* v. *Blank*, 107 N.Y. 91, 13 N.E. 615, representation that wife was a widow when actually she was a divorcee; *Fontana* v. *Fontana*, 77 Misc. 28, 135 N.Y.S. 220, chastity of defendant wife; *Libman* v. *Libman*, 102 Misc. 443, 169 N.Y.S. 900, chastity of defendant husband; *Svenson* v. *Svenson*, 178 N.Y. 54, 70 N.E. 120, venereal disease of husband prior to marriage, but cured at the time of marriage; *Gordon* v. *Gordon*, 225 App.Div. 822, 232 N.Y.S. 541, misrepresentations as to fact of defendant's pregnancy by plaintiff; *Weill* v. *Weill*, 104 Misc. 561, 172 N.Y.S. 589, previous marriage of defendant husband and annulment thereof not disclosed to plaintiff. The following misrepresentations and concealments have been held to be sufficient to grant annulments of marriages: Of the fact that defendant was a thief, *Keyes* v. *Keyes*, 6 Misc. 355, 26 N.Y.S. 910; the defendant a gambler, *King* v. *Brewer*, 8 Misc. 587, 26 N.Y.S. 1114; misrepresentations of citizenship, *Truiano* v. *Truiano*, 121 Misc. 635, 201 N.Y.S. 573; drug addict, *O'Connell* v. *O'Connell*, 201 App.Div. 338, 194 N.Y.S. 265; threats inducing marriage, *Fratello* v. *Fratello*, 118 Misc. 584, 193 N.Y.S. 865; the defendant a consumptive, *Sobol* v. *Sobol*, 88 Misc. 277, 150 N.Y.S. 248; concealment of fact of defendant's epilepsy, *Lapides* v. *Lapides*, 224 App.Div. 257, 229 N.Y.S. 754; no intention of living with plaintiff, *Moore* v. *Moore*, 94 Misc. 370, 157 N.Y.S. 819.' In some of these cases English courts would not have granted decrees. Cf. *Mitford* v. *Mitford* [1923] P. 130. In Quebec, neither fraud nor error as to the qualities of a person ground annulment: *X* v. *Z* [1947] Que.S.C. 430 (respondent suffered from venereal disease at time of marriage and had been sentenced as a public prostitute: she posed as honourable and respectable: action dismissed): this case seems to be at variance with *D.* v. *J.* [1947] Que.S.C. 143 (ex-convict marries under assumed name, decree given) and *N.* v. *E.* [1945] Que.S.C. 109 (concealment of incurable disease, chronic psoriasis).

[12] S. 7 (1) (*d*), now s. 8 (1) (*d*) of the 1950 Act; for proviso thereto, see *supra*, where *Chaplin* v. *Chaplin* [1949] P. 72 is discussed.

[13] Cf. *Smith* v. *Smith* [1948] P. 77; and *Liff* v. *Liff* [1948] W. N. 128, where blood tests were admitted. Communication of a venereal disease is cruelty.

statutory provision which applies to concealed pregnancy *per alium*, it was established [14] that concealed pregnancy or loss of virginity was not the type of fraud 'which renders the mind of one of the parties not a truly consenting mind'. Loss of virginity still comes within this dictum. The 1937 section does not apply in terms to the cases where a woman induces a man to marry her by fraudulently, or honestly but mistakenly, telling him that she is pregnant by him. A distinction might be drawn, in the first instance, between cases where the parties have had sexual intercourse before marriage, and other cases: where there has been intercourse before marriage, the man marries in part reliance on his own conduct, regardless of the fraud or honesty of the woman.[15] Where there has been no pre-marriage intercourse, the circumstances would seem in the one case to fall into a category already dealt with, that of duress combined with fraud [16]; but where the woman's belief is honest but mistaken, there would seem to be no ground of relief for the man, for her pressure was 'properly' brought on the man. It is difficult to draw a similar distinction in the case of a man who marries a woman who says that she is pregnant by another man, the object of the marriage being partly to conceal a scandal and partly to give the child an apparent lawful wedlock. If the woman is honestly mistaken, the man would have no remedy, but if she is fraudulent, the facts would not be likely to fall within the category of duress combined with fraud: perhaps in such a case also the man is partly the author of his own wrong, though it

*Browning* v. *Browning* [1911] P. 161; cf. *Chesnutt* v. *Chesnutt* (1854) 1 Sp.Ecc. & Ad. 196: it is also evidence of adultery, *Gleen* v. *Gleen* (1900) 17 T.L.R. 62; *Anthony* v. *Anthony* (1919) 35 T.L.R. 559; *Steed* v. *Steed* (1927) 71 S. J. 391; *contra Glikstin* v. *Glikstin* (1917) 33 T.L.R. 203.

[14] *Moss* v. *Moss* [1897] P. 263. Followed in *A.* v. *B.* [1906] 3 W.L.R. 113 (Manitoba). See also *Horak* v. *Horak* (1860) 3 Searle 389 (Cape of Good Hope), where a marriage was declared void on the ground of previous stuprum and pregnancy unknown to the husband: Bell J. suggested that such a marriage could be condoned by co-habitation after knowledge, also that the decision might have been different had the wife not had knowledge at the time of the marriage, as she in fact had, of the pregnancy, pp. 392–93: cf. *Molton* v. *Camroux* (1849) 4 Ex. 17, 19–20; *Ellis* v. *Bowman* (1851) 17 L.T. (o.s.) 10, 11. The Scottish authority is *Lang* v. *Lang* [1921] S.C. 44: see footnote 40, *infra*. It is to be observed that in *Horak* v. *Horak*, Hodges C.J. drew a distinction between immorality and pregnancy prior to marriage. Compare *Griffith* v. *Griffith* [1944] 1 Ir.R. 35, with *Mason* v. *Mason* (1924) 261 S.W. 40, 42; 164 Ark. 59: in the *Arkansas Case* it was held that false representations of pregnancy were no ground of annulment where the parties had had sexual intercourse before marriage. The man marries in part reliance 'upon the knowledge of his guilty conduct. He does not assume unknown liabilities and conditions, as in the case where a man marries a woman whom he believes is chaste, when in fact she is concealing the fact that she is pregnant by another. . . .' See also *M'Innes* v. *More* (1758) 3 Craig. & St. 40, cited in *Dalrymple* v. *Dalrymple* (1811) 2 Hag.Con. 54, at p. 101; and *X* v. *Z* [1947] Que.S.C. 430, referred to in footnote 11, *supra*.

[15] See the Arkansas case, *Mason* v. *Mason*, footnote 14, *supra*.

[16] See especially the South African case, *Smith* v. *Smith*, and the Kentucky case, *Shepherd* v. *Shepherd*, discussed above.

might seem equitable, in this case at any rate, to consider fraud as a separate ground of annulment.[17]

### Estoppel, Validation and Ratification

Assuming that a marriage is defective for the reasons discussed, (a) to what extent can a party responsible for that defect put the marriage in issue and 'take advantage of his own wrong', and how far is the law of estoppel relevant: (b) to what extent can such a marriage be 'validated' or 'ratified' by the parties to it.

Where the marriage in question is voidable, these two problems may be considered together. The usual ground is impotence, and 'there appears to be no reason to doubt that the right of the impotent spouse to sue, whatever were its origins and limits, was accepted in this country', subject to two exceptions; 'first, where the petitioner himself being aware of his own impotence, had knowingly deceived the other spouse into contracting the marriage; and, secondly, where one entered into matrimony with a spouse whom he knew at the time to be impotent'.[18] The underlying principle of the so-called doctrine of sincerity in nullity suits on voidable marriages is the existence of 'facts and circumstances proved which so plainly imply, on the part of a complaining spouse, a recognition of the existence and validity of the marriage as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect'.[19] This is the basis of old-age marriages, of the *tanquam soror* doctrine. The same principle, at the bottom of which is knowledge of the facts complained of at the relevant time, applies to all voidable marriages, though the statutory version of the sincerity doctrine, as seen,[20] is not read equitably.

Where the marriage in question is void, it would seem at first sight that it can never be possessed of any legal consequences: what is void is void *ipso jure et ab initio* without need of declaration to that effect by a court of law[21]: *quod ab initio non valet in*

[17] The present writer considers fraud to be a species of the genus mistake: cf. Roman-Dutch law, where 'the general rule' is 'that a marriage cannot be set aside on the ground of fraud', *Venter* v. *Venter* (1949) S.A.L.R. 123, 131–32 (Witwatersrand), Voet 24.2.15, and where Roman-Dutch and English principles coincided on many important issues.

[18] *Harthan* v. *Harthan* [1949] P. 115, 129; [1948] 2 All E.R. 639, 644, C.A., *per* Lord Merriman, P. Cf. *Venter* v. *Venter* [1949] S.A.L.R. 123 (Witwatersrand).

[19] Lord Watson, *G.* v. *M.* (1885) 10 A.C. 171, 197–98; also *E.* v. *E.* [1921] P. 399. *Nash* v. *Nash* [1940] P. 60, *Clifford* v. *Clifford* [1948] 1 All E.R. 398, *Harthan* v. *Harthan*, *supra*, *Baxter* v. *Baxter* [1948] A.C. 274, 289. Cf. *Punter* v. *Punter* [1946] 2 D.L.R. 353, 357 (Canada), *M.L.* v. *E.L.* [1931] S.C. 477 (Scotland).

[20] *Supra*. On *tanquam soror* doctrines, see *Brown* v. *Brown* (1828) 1 Hag.Ecc. 523, 524.

[21] See, for example, Tindal C.J. in *Allen* v. *Wood* (1834) 1 Bing.N.C. 8, 11–12; Lord Cranworth in *Brook* v. *Brook* (1861) 9 H.L.C. 193, 222–23; Lord Greene, then M.R., in *De Reneville* v. *De Reneville* [1948] 1 All E.R. 56, 60, C.A.

*tractu temporis non convalescet.*[22] What effect must be given to the doctrine of knowledge, of sincerity, in such cases? In *Andrews* v. *Ross*[23] a marriage was void for affinity, both parties knowing of the impediment at the time of the marriage. Butt J. said that while in other courts the petitioner 'would not be allowed to get rid of any obligation she had entered into with her eyes open . . . the ecclesiastical courts have applied a different rule; . . . the principles prevailing in regard to the contract of marriage differ from those prevailing in all other contracts known to the law'. To the same effect is *Miles* v. *Chiltern*,[24] where *A*, knowing that *B*'s first husband was still alive, purported to marry *B*. In spite of *A*'s deception and fraud, Dr. Lushington granted a decree of annulment of marriage. In *Turner* v. *Meyers*,[25] the principle was stated that a certified lunatic, on recovering his senses, may come forward to maintain his own past incapacity at the time of marriage: the degree of proof required was stronger than in other circumstances.

Shelford,[26] on the authority of *Mrs. Ash's Case*,[27] wrote: 'There is authority for the proposition that a marriage by a *non compos*, when of unsound mind, is rendered valid by consummation during a lucid interval'. As Lord O'Brien said in another case, '. . . How could the marriage be validated if it was altogether void? Such a proposition, it was contended, would find no support from

[22] See *Fenton* v. *Livingstone* (1859) 3 Macq.Scot.R. 497, 555, H.L.(Scot.).

[23] (1884) 14 P.D. 15. Cf. *Grant* v. *Giannetti* [1913] P. 137, delay not material in making absolute decree nisi on marriage void for bigamy.

[24] (1849) 1 Rob. 684. Even in the case of a void marriage, '. . . the party proceeding, who is asking the court to pronounce the second marriage null, is of necessity bound to admit and plead the fact of that second marriage', p. 693.

[25] (1808) 1 Hag.Con. 414, 418: see *Shelford on Lunacy*, p. 1578.

[26] On *Marriage* (2nd ed., 1841), p. 197: the same doctrine is stated in F. Walton's *A Handbook of Husband and Wife according to the Law of Scotland* (1893), p. 8, where *Johnston* v. *Brown* (1823) 2 Shaw & Dun. 495, is cited in support, but does not aid the contention. Wood Renton, *Lunacy* (1897), p. 18, says that by Lord Stowell's time consummation in a lucid interval no longer validated a marriage, the consensual idea being predominant.

[27] (1702) Finch P.C. 703, Freeman C.C. 259, 1 Eq.Cas.Abr. 278. A marriage of a lunatic consummated in a lucid interval and so 'made good' is compared with 'the marriage of an infant before the age of discretion (which) may be made good by a subsequent assent'. But this example is unsatisfactory. There could in theory be no marriage if the parties were under the age of rational consent, fixed at seven, and later at 14 for boys and 12 for girls. If the parties were incapable of consummation there was no marriage. Yet Coke would give dower regardless of the late husband's age at marriage, 'albeit he were but four yeares old'. Co.Litt. 33a. A marriage originally non-existent because under the age of discretion, could be validated by cohabitation and consummation at 'full age', *Corbet's Case*, 7 Co.Rep. 44a. So, as pointed out in *Ash's Case*, a marriage originally void was turned into a valid marriage: what was void was treated as voidable. Cf. *Selby* v. *Selby* (1771), cited by Poynter, *Marriage and Divorce* (1824) p. 68, n. (s): a marriage was absolutely void for lack of consent under the Marriage Act, 1753, 26 Geo. 2, c. 33, s. 11. Held, consent given *after* the ceremony validated a marriage contracted without it: see *contra*, *Lawless* v. *Chamberlain* (1889) 18 O.R.(Ch.D.) 296, 309 (Ontario), *Sullivan* v. *Sullivan* (1818) 2 Hag.Con. at p. 241.

" reason ". I am afraid there are many things lying at the root, at the foundation, of the Christian religion, mysteries of faith, for an elucidation of which we should appeal to " reason " in vain '.[28] Following on from this statement, one may refer to the cases where a petitioner has found that a void marriage has had the effect of being considered a valid marriage.

In *Wilkins* v. *Wilkins*,[29] a wife petitioned for judicial separation on the ground of adultery. The husband replied that at the time of their ' marriage ', his wife was married to *X* who was then still living. The jury did not believe him, and the wife obtained her decree. Thirty years later *X* re-appeared. The ' husband ' thereupon petitioned for a decree of nullity of marriage. Gorell Barnes J. dismissed the petition on the ground that while the decree of judicial separation subsisted, the second husband was estopped from pleading the invalidity of his marriage.[30]

In *Valier* v. *Valier*, Lord Merrivale held that there was no valid marriage in existence because the petitioner did not know that he was taking part in a marriage ceremony. Further, there had been no ' ratification ' by subsequent conduct.[31] A similar suggestion appears in *Ellis* v. *Bowman*,[32] a case of a non-certified lunatic in a lucid interval. The lunatic was certified one year after the marriage and declared to have been insane for the past twenty years. One of the points argued, and left for the jury, was whether the marriage had been ' acquiesced ' in.[33] *Woodland* v. *Woodland*[34] is similar to *Wilkins* v. *Wilkins*. In *Woodland* the woman's petition for restitution of conjugal rights was not contested. Later the husband brought a nullity suit on the ground that his wife's marriage to him was bigamous. It was held that the basis of the status of the parties was conclusively established *inter partes*, and that even a petition based on bigamy did not afford an exception to the general rule of estoppel in these cases.[35]

Neither *Wilkins* nor *Woodland* was cited in the cases of *Square* v. *Square* and *Cowan* v. *Cowan*,[36] two inter-related petitions. *H* and *W* married by declaration in Scotland. *W* then ' remarried '.

[28] *Ussher* v. *Ussher* [1912] 2 Ir.R. 445, 480. In this case no ' validation ' of the marriage was in fact attempted.

[29] [1896] P. 108.

[30] The ' husband ' had the decree of judicial separation set aside and then obtained a nullity decree.

[31] (1925) 133 L.T. 830, 832. As stated above, ' ratification ' suggests the voidable marriage; ' validation ' indicates the void.

[32] (1851) 17 L.T. (o.s.) 10. Cf. *Molton* v. *Camroux* (1849) 4 Ex. 17, 19–20, where there is a suggestion, admittedly not supported by the cases, that knowledge at the time of the marriage of the other party's unsoundness of mind would prevent the marriage being considered void (this being analagous to the rule in commercial cases).

[33] At p. 11. *Leggat* v. *O'Brien*, Mil.Irish Eccl.Cas. 397 is cited in support.

[34] [1928] P. 169.

[35] Both *Wilkins* and *Woodland* were followed in the Ontario case, *Thompson* v. *Crawford* [1932] 2 D.L.R. 466 (Ontario). See H. L. Cartwright, *Law of Divorce in Canada* (2nd. ed., 1945) 57–9.

[36] [1935] P. 120.

*H* thereupon brought a divorce petition. The wife successfully denied the existence of the first marriage, her second spouse supporting this contention. Later this second husband brought a petition for nullity on the basis of his wife's bigamy. It was held that the second husband was not estopped from alleging the validity of the first marriage, for his previous denial of its soundness was not made in order to mislead the woman, her knowledge of the facts being better than his own. The denial was made for 'a common purpose' upon the woman's initiative. 'If two people with the same source of information assert the same truth, or agree to assert the same falsehood at the same time, I cannot see how either can be estopped as against the other from asserting differently at a later time. When, as in this case, the party claiming the benefit of the estoppel had in fact better information than the other party the case would seem to be *a fortiori*.'[37] The second marriage was null and void. The woman's first husband having in the meantime married again, his second marriage was also declared null and void.

The American cases reflect, though to a lesser degree, the English difficulties with estoppel and void marriages. It was held in Michigan that where parties engage upon a contract of marriage void for bigamy, this being then unbeknown to one or both of them, uninterrupted cohabitation after removal of the impediment produces a valid common law marriage, even though the fact of removal is not known to either party: there was thus a valid marriage by 'accident'.[38] The majority of American cases, in which the problem has been squarely faced, are completely against according any support to the idea of marriages by estoppel.[39] 'There can be no such thing as estoppel to bring about the validity of the marriage if it is denied in its inception.'[40]

[37] At p. 126. It is to be observed, as counsel for the petitioner indicated, that the question of whether there can be a marriage by estoppel did not arise in the case, for no estoppel was found to lie: at pp. 123–24.

[38] *Jones* v. *General Motors* (1945) 17 N.W. 2d. 770, 310, Mich. 605.

[39] *Williams* v. *The State* (1870) 44 Ala. 24, 26–7: 'co-habitation, of itself, would not render a void marriage valid'. *Schein* v. *Schein* (1938) 8 N.Y.S. 2d. 463, 169 Misc. 608, an exactly opposite decision to *Woodland*, Collins J. refusing to allow a valid marriage to derive from an estoppel, even where the defendant profits from his own wrong, pp. 464–65. So, too, *Toler* v. *Oakwood* (1939) 4 S.E. 2d. 364, 173 Va. 425 (Virginia), a marriage void for bigamy by statute cannot be ratified; and *Kroner* v. *Kroner* (1940) 23 N.Y.S. 2d. 670, 673, a void marriage cannot be acquiesced in by an individual. And see next footnote.

[40] *People* v. *Kay* (1931) 252 N.Y.S. 518, 141 Misc. 574. Also *McCullen* v. *McCullen* (1914) 147 N.Y.S. 1069, 162 App.Div. 599: Laughlin J. said at p. 1071: '. . . where a marriage is void, although the Legislature has authorised the court in the interests of the public to enter a formal decree declaring it void, it is void without any decree of the court, and forms no obstacle to the right of either party to marry again'. (With this may be compared the statement in *De Reneville* v. *De Reneville* [1948] P. 100, 110–11, [1948] 1 All E.R. 56, 60, C.A., to the same effect.) In the case of a void marriage, said the learned judge (and in New York law this was only possible in petitions based on bigamy, all other defects making marriages voidable: a salutary system, it would seem), 'there has been no attempt on the part of the Legislature to validate it for any period'. See the Scottish case,

The concept of the validation of void marriages is most unsatisfactory, though it has received powerful support.[41] In any event, a distinction should be drawn between marriages void for bigamy and those void on other grounds. The *ratio decidendi* of the *Woodland* and *Wilkins Cases* permits a party to be validly married to two persons at once : it does not help to say that the estoppel only operates *inter partes*, for from the point of view of the spouses that is usually the only relevant consideration. On the other hand, there is something to be said for the hardship of cases where parties living together as man and wife (one or both of whom might be dead when the marriage is attacked) are declared not to have been married at all because of some defect in formalities : but to give weight to hardship in these circumstances would amount to the conversion of void into voidable marriages. At best one could justify such a metamorphosis when there was some innocent error as to formalities. It is difficult to see how, without statutory intervention, there can be accepted a principle whereby an individual may convert a void into a valid marriage. From this point of view, *Miles* v. *Chiltern* must be preferred to *Woodland* v. *Woodland* and *Wilkins* v. *Wilkins*. A void marriage is always void; and no decree of any court is necessary in order to establish that fact.[42]

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*Alexander* v. *Alexander* [1920] S.C. 327; 57 Sc.L.T. 423; 1 S.L.T. 307, where a marriage defective for fraud was ' adopted '; it was later held that the facts of such a case did not amount to fraud, *Lang* v. *Lang* [1921] S.C. 44. But the point of interest here is that the courts of Scotland do not profess to know the voidable marriage concept : see, *e.g.*, *Lendrum* v. *Chakravrati* [1929] S.L.T. 96, 99–100, *per* Lord Mackay; *Lang* v. *Lang* [1921] S.C. 44, 55, *per* Lord Scott Dickson, Lord Justice-Clerk. It would follow, therefore, that it was a void marriage that was ' adopted ' in *Lang*.

[41] Sir Frederick Pollock (1887) 3 L.Q.R. 252–53.

[42] See *De Reneville* v. *De Reneville*, previous footnote, and American cases there cited.

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# TAKING AND THE ACQUISITION OF POSSESSION IN LARCENY

The defects in the law of larceny, to which the statutory requirement that the prosecution must prove the existence of a felonious intent at the time of the taking has given rise, are well known. Mr. Cross has lately re-examined [1] the inadequacies of this branch of the law in the light of the recent decision of a Divisional Court in *Ruse* v. *Read*.[2] In his discussion of this case and of its implications in the doctrine of possession, there is an underlying assumption that 'taking' in larceny is virtually equivalent to the acquisition of possession. Most of the great wealth of literature on this topic is geared to the same assumption. Ample authority to support it is to be found in pre-1916 cases. There is some evidence in the Law Reports that it has survived the Larceny Act of that year. It is submitted, however, that its validity should now be open to question; and further, that by its rejection, the unfortunate consequences of the need for a simultaneous taking and *animus furandi* can be mitigated.

Only once has the Court of Criminal Appeal given a relatively unequivocal interpretation of the word 'take' in section 1 of the Larceny Act, 1916. In *R.* v. *Hudson* [3] Charles J. delivering the judgment of that court cites with approval the words of Coleridge C.J. in *R.* v. *Ashwell* [4] 'in good sense it seems to me he did not take until he knew what he had got'. This is a clear principle—the taking is not completed until the taker not only possesses but also has some knowledge of the *nature* of the object which he possesses. *A fortiori* it would seem clear that taking is not completed until the taker knows that he possesses the particular object concerned. The distinction between the fact situation in *R.* v. *Riley* [5] and that in *R.* v. *Ashwell* (*i.e.*, the distinction between knowledge of the identity of the object and knowledge if its major attributes) is perhaps theoretically valid, but in practice it may be difficult to draw, and is certainly not crucial. In *R.* v. *Ashwell* Coleridge C.J. described the circumstances in *R.* v. *Riley* as 'hardly different' from those in the case before him. In *R.* v. *Ashwell* the accused knew that he had a particular coin but he was unaware of one of its major attributes (its value). In *R.* v. *Riley* the jury found 'that at the time of leaving the field the

[1] M.L.R., Vol. 12, p. 228.
[2] [1949] 1 K.B. 377.
[3] [1943] K.B. 458 at p. 462.
[4] (1885) 16 Q.B.D. 190 at p. 225.
[5] (1853) Dears.C.C. 149; 22 L.J.M.C. 48; 6 Cox C.C. 89; 20 L.T.(o.s.) 228; 17 Jur. 189; 17 J.P. 69.

prisoner did not know that the lamb was in his flock . . .'.[6] This finding might be phrased that Riley did not know that he possessed that particular lamb : or it might be phrased that Riley knew that he had the flock but was unaware of one of its major attributes (the number of beasts comprised therein). Again, in *R.* v. *Hudson* the accused knew that he possessed the whole package including its contents although he did not know the nature of the contents. On the other hand he did not know that he possessed a particular cheque.

It is clear that the decision in *R.* v. *Hudson* is new authority for the proposition that taking for the purposes of the law of larceny involves a positive mental element. The nature of this mental element is also tolerably clear. It can be expressed in a form readily understandable by a jury, namely, knowledge that a particular object is possessed plus knowledge of its major attributes. It follows from this, and it is submitted it is implicit in the decision in *R.* v. *Hudson*, that taking for the purposes of the law of larceny, or at least for the post 1916 law of larceny, involves something more than the acquisition of possession. The form which earlier judicial emphasis on the need for a positive mental element in taking assumed, was the proposition that *possession* was not acquired by a thief unless and until such element was present. Cave J., for instance, said in *R.* v. *Ashwell* : ' In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now a man does not consent to that of which he is wholly ignorant . . .'.[7] This view of the mental element requisite for the acquisition of possession is, as it stands, hardly compatible with the decision in *Hibbert* v. *McKiernan* where the court held that a golf club possessed golf balls, of the existence of which it was unaware.[8] Reconciliation is possible if a distinction is made between the requisites of acquisition of a possession which is sufficient to be the object of larcenous violation, and the requisites of acquisition of possession, which acquisition itself constitutes the larcenous violation. The validity of this differentiation is obscured by terminological ambiguity. Cave J.'s dictum is unexceptionable if it means simply that the acquisitive act in larceny is not complete without the mental element he describes. He is however misleading when he describes this acquisitive act as the acquisition of possession rather than as taking. But the error is one of mere terminology; it is an error which would be less patent before 1916 than at the present day;

[6] (1853) Dears.C.C. at p. 151.
[7] 16 Q.B.D. 190, at p. 203.
[8] [1948] 2 K.B. 142; see, too, *London & County Banking Co., Ltd.* v. *London & River Plate Bank, Ltd.* (1888) 21 Q.B.D. 535, esp. Lindsay L.J. at pp. 541–2 : see, too, the *Button* ' *B* ' *Pennies Case*: *The Solicitor*, Vol. 14, No. 3, p. 50.

and it is an error into which the Court of Criminal Appeal (although approving Cave J.'s words) does not itself fall in *R.* v. *Hudson*.

What is important is that the Court of Criminal Appeal has reaffirmed that the acquisitive act in larceny is complete only when supplemented by a positive mental element, of a kind which is in fact not necessary in other cases of acquiring possession. To persist in identifying the acquisitive act in larceny with the mere acquisition of possession, is therefore, either incorrect, or both misleading and detrimental to the conceptual unity of common law possession. Clarity demands that a difference in substance should be reflected in terminological divorce. The use of the word 'take' by the legislature and by the Court of Criminal Appeal facilitates this. The acquisitive act in larceny then becomes a 'taking', with which the acquisition of possession is not co-extensive, but of which it is a necessary constituent. The acquisition of possession may itself include some mental element—the so-called *animus possidendi*. But there is a further mental element which is a separate and essential element of a larcenous taking,—knowledge that you possess and knowledge of the major attributes of what you possess. Taking is completed when the accused has possession and has this knowledge. Possession is usually continuing, but taking is always instantaneous. The time of the taking is the time of the completion of the taking. It is at that moment, not it is submitted necessarily at the moment of the acquisition of possession, that the accused must have the *animus furandi* for 'At that moment, for the first time, he was in a position—in which he had not been before—to form an intent'.[9]

This interpretation of the word 'take' need not run counter to the provisions of section 1 (2) (i) of the Larceny Act, 1916. That sub-section provides :

'the expression "takes" includes obtaining the possession—

(*a*) by any trick;

(*b*) by intimidation;

(*c*) under a mistake . . .;

(*d*) by finding . . .;'

The meaning of this sub-section may be regarded as being simply that the acquisition of possession which is always an essential ingredient of taking, may be affected inter alia by a trick, intimidation, mistake or finding.

The rejection of the view that taking and acquisition of possession are identical and therefore necessarily simultaneous happenings, enables us to avoid the various difficulties which are respectively inherent in the judgments of Pollock C.B. and Parke B. in *R.* v. *Riley*. The dubious historical basis and curious contemporary implications of the latter's reasoning in that case have

[9] *Per* Charles J. in *R.* v. *Hudson*, *supra*, at p. 462.

been pointed out too many times to require repetition.[10] The Chief Baron's alternative grounds for his decision are based on the hypothesis that Riley did not begin to possess the thirtieth lamb until it was pointed out to him. This might, as counsel for Riley pointed out, involve holding that while the lamb was being driven along the road it was in possession of nobody. In view of the decision in *Hibbert* v. *McKiernan*[11] it is questionable whether a court would today be disposed to accept this view, at least in a criminal case. To hold that Riley began to *possess* the lamb when he drove it away, but that he did not *take* it until he knew that he possessed and he knew what he possessed, would avoid all these difficulties and at the same time would preserve what in this type of case is generally regarded as a desirable conviction.

Even Baron Martin's hypothetical prisoner who 'takes an article,—an umbrella for instance,— by mistake, and three or four days afterwards discovers who the owner is, by the name which is upon it, and yet resolves to keep it as his own property[12]' could, on this view of taking, be convicted of larceny, assuming that his decision to steal the umbrella coincided with his discovery of one of its major attributes, namely the fact that it was not his property. In *R.* v. *Riley* Pollock C.B. takes the same view in a very similar case : 'Suppose a traveller at an inn in packing up six pieces of anything packed up a seventh with it by mistake in his portmanteau. He does not find out the mistake till he goes to a distance, and then converts it to his own use. When does he take it? Surely when he discovers his mistake and resolves to appropriate it to himself *animo furandi*'.[13] The difference between these two cases is the same as the difference between the fact situation in *R.* v. *Ashwell* and that in *R.* v. *Riley*,—a difference which, it has already been submitted, is in the present context without significance.

That in *Ruse* v. *Read* the same approach would perhaps not have led to a conviction is due to the findings of the magistrates, (1) that on the night of June 30th the accused was too drunk to form the *animus furandi*, but apparently (2) that he was not so drunk that he did not know that he possessed a particular bicycle which was not his. If the first of these findings was wrong, there would have been no difficulty. If it was right, one may perhaps query the second finding. If the magistrates had given due regard to the fact that a positive mental element must exist in every taking they might have found otherwise on this second point : in which case there would again have been no difficulty.

The case of *Ruse* v. *Read* is unsatisfactory for other reasons :

[10] See especially Turner: *Modern Approach to Criminal Law*, p. 374. Also Lord Coleridge C.J. in *R.* v. *Ashwell* (1885) 16 Q.B.D. 190 at p. 226.
[11] [1948] 2 K.B. 142.
[12] *R.* v. *Preston* (1851) 2 Den. 359: contrast Cross 12 M.L.R. at p. 232.
[13] 1 Dears.C.C. at p. 153.

(1) The Divisional Court accepts the reasoning of Parke B. in *R.* v. *Riley*. An extract from the judgment of Pollock C.B. as reported by Dearsly is cited as evidence of his agreement with Parke B.'s views. The Chief Baron's acknowledgment of the possibility that there was no taking at the time that Riley drove the lamb out of the field is deliberately suppressed. A few dots signify this omission in the otherwise verbatim quotation from Dearsly's Report.[14] In point of fact not only did he interrupt counsel to say 'My difficulty is to see that there was any taking at all when the sheep left the field',[15] but in his judgment as reported in the Law Journal Reports, Cox's Criminal Law Cases, the Law Times Reports and the Justice of the Peace Report, this contention forms the basis of one of two alternative ratios. 'I am not desirous of calling in aid the technicality of continuing trespass; and I think this case may be decided upon the ground either that there was no taking at all by the prisoner in the first instance, or a wrongful taking, and in either case, as soon as he appropriates the property, the evidence of felony is complete.'[16] Moreover, although as the Divisional Court points out, the affirmation of Riley's conviction by the Court of Crown Cases Reserved was unanimous, there is no evidence that this unanimity extended to the reasoning of the judges. Pollock C.B. only agrees with Parke B. in an alternative ratio. The reasoning of Talfourd and Crompton J.J. is unreported. An interjection by Williams J. does suggest that he agreed with Parke B.[17]

(2) The citation with approval of *R.* v. *Hudson* is inconsistent with the Court's reliance upon the judgment of Parke B. in *R.* v. *Riley*.

(3) It is unfortunate that a Divisional Court[18] when called upon to interpret a modern statute should see fit to rely on a case decided over half a century before the passing of the statute concerned, and itself based on reasoning which at best must be

[14] [1949] 1 K.B. at p. 383; see 1 Dears.C.C. at p. 158.
[15] 22 L.J.M.C. 48.
[16] 6 Cox C.C. at p. 92.
[17] 6 Cox C.C. at p. 91.
[18] In *R.* v. *Matthews* [1950] 1 All E.R. 137; (1950) 34 Cr.App.R. 55, Lord Goddard C.J. has placed the stamp of the approval of the Court of Criminal Appeal itself on the decision in *Ruse* v. *Read*. Matthews received certain stolen goods knowing them to have been stolen but intending to hand them over to the police. Later he decided to appropriate them, and did so. He was convicted of receiving stolen goods. The Court of Criminal Appeal quashed the conviction because there was no intention to appropriate at the time of the receipt of the goods. The Lord Chief Justice's approving reference to *Ruse* v. *Read* is obiter in a double degree. *R.* v. *Matthews* is a case of receiving, *Ruse* v. *Read* was a case of larceny. In *R.* v. *Matthews* the receipt was treated as non-trespassary, in *Ruse* v. *Read* the original taking was a trespass.

Lord Goddard makes it clear that even if the original taking had been a trespass, an indictment for receiving would not lie. The mystery of Baron Parke's invention deepens, a trespass continues for one purpose but not for another.

regarded as somewhat equivocal. This is particularly so when it is accompanied by an almost glancing 'approval' of a post-statute decision of the Court of Criminal Appeal,—an approval which, it is submitted, is inconsistent with the particular view of the earlier case upon which the Court relies.

It is perhaps arguable, and certainly to be hoped, that the decision in *Ruse* v. *Read* will not be erected into a barrier against the development of this part of the law of larceny along the lines suggested above;—a development which will, it is submitted, lead to the most desirable result that is compatible with the statutory requirement that the *animus furandi* must exist at the time of the taking.

If the interpretation of the word 'take' suggested in this note is accepted, and the term is no longer regarded as meaning merely the acquisition of possession, a further and more drastic rationalisation of the relationship between larceny and possession becomes tempting. The necessity of proving a mental element *in addition* to proof of the acquisition of possession, makes proof of the mental element necessary for the acquisition of possession otiose. Substantially 'taking' means the acquisition of the *corpus* of possession plus the independent mental element described above. Proof of an *animus possidendi*—the mental element in possession, is a gratuitous complication. The value of retaining the acquisition of possession even as one ingredient of larcenous taking may therefore be doubted. But the history of the law of larceny, the general tenor of the Larceny Act and in particular the words of section 1 (2) seem to prohibit this further simplification.

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# SUGGESTED REFORM OF THE LAW RELATING TO CHEQUES

It has been estimated that 90 per cent. of all the internal financial and wholesale trading transactions in Great Britain and the United States are settled by cheque, and there is a tendency to take it for granted that the cheque, in its present form, is the type of instrument best suited for the purpose.[1] The object of this article is to question that assumption and to investigate the possibilities of devising a method of payment which will provide a higher standard of safety to bankers and traders alike.

The inherent weakness of the present system is the comparative ease with which a thief can collect the proceeds of cheques that he has stolen. When this happens, the loss falls either upon the person from whom the cheques were stolen, or upon an innocent third party to whom the thief negotiates the instruments, or upon the collecting banker if he is unable to claim any statutory protection in respect of his common law liability for conversion. It is impossible to estimate what annual sum is lost by the trading community in this way, but an examination of the law reports gives some indication of the losses sustained by bankers when collecting cheques in respect of which they are not covered by any statutory protection. A banker has no statutory protection whatever when collecting uncrossed cheques, and, if the true owner makes a claim against him in respect of such instruments, he has, as a rule, no possible defence. It is true that if the cheques are crossed, he may be able to rely upon section 82 of the Bills of Exchange Act, 1882. But the standard of care which he must exercise before he can bring himself within that section is so high that, time after time, the true owner has succeeded in an action for conversion against him. The reports tell a sorry tale of these losses. In *Underwood, Ltd.* v. *Bank of Liverpool and Martins*, *Underwood, Ltd.* v. *Barclays Bank* (1924),[2] the damages amounted to over £10,000; in *Alexander Stewart & Son, Ltd.* v. *Westminster Bank* (1926),[3] to £13,741; and in *Lloyds Bank* v. *Savory & Co.*

[1] Thus Mr. R. A. Wilson in his inaugural address as president of the Institute of Bankers in 1938, expressed his views in no uncertain terms. 'I hope, at least,' he said, 'that I have made clear my own opinion, that, as a negotiable credit instrument for effecting payments the cheque stands supreme and is never likely to be supplanted': *Journal of the Institute of Bankers*, Vol. LIX (1938), p. 426. Cf. Mr. R. W. Jones who, in his *Gilbart Lectures on Banking*, 1949 (at p. 2), observed: 'The cheque continues to function as a medium for paying debts and that ingrained hesitancy to make any violent or radical change in our national habits may well preserve the cheque's pride of place for generations to come'.

[2] [1924] 1 K.B. 775.

[3] [1926] W.N. 271.

(1933),[4] to £6,012. Furthermore, the defendant banks had to pay the very heavy costs which actions of this kind necessarily entail.[5] Moreover, for every case which finds its way into the law reports, there are many others which the banks settle out of court. Surely it is not beyond the ingenuity of traders, bankers and lawyers to provide a system which will obviate these losses?

It is thought that the most profitable approach to the problem is to consider historically such safeguards as have evolved, with particular reference to the various types of crossings. The shortcomings of the present system having been investigated, suggestions for the reform of the law will be made.

### Limited Protection of General and Special Crossings

The practice of crossing cheques began towards the end of the eighteenth century, but, in its inception, the custom was simply part of the machinery of the London Clearing House.[6] At the Clearing House, every clearing banker was provided with a drawer, on which his name was affixed, and each day the clerks from all the other banks would deposit in that drawer bills and cheques, payable at or drawn upon, that particular banker. As a means of ascertaining by whom the various instruments had been put into the drawer of any one banker, the name of the collecting banker was written across the face of each cheque or bill by one of his clerks.[7] Gradually, the drawers of cheques came to know of this practice and decided that it would be a useful safeguard against loss or theft if they wrote across the cheques which they issued the names of the payees' bankers, so that payment would be made only to the banker named in the crossing. If they did not know where the payee banked, they simply wrote '& Co.' between two lines across the cheque, intending thereby that the cheque should only be paid if presented through a bank and not by the holder in person.

[4] [1933] A.C. 201.

[5] For a comprehensive account of what has been held to amount to negligence under section 82, see Byles, *Treatise on the Law of Bills of Exchange, etc.* (20th ed.), pp. 40–45, and Chalmers, *Digest of Bills of Exchange, etc.* (11th ed.), pp. 261–264. The well-known *Savory Case* (*supra*) is an illustration of the very high standard which the collecting banker must achieve if he is to plead the section successfully. In that case, the House of Lords, by a majority of three judges to two, established the rule that a banker, if he wishes to obtain the protection of section 82, must ask a respectably introduced married woman the occupation of her husband and the name of his employer, if any. One wonders whether it will ever be held that a bank, when opening an account for a man known to be married, ought to make a similar inquiry with reference to his wife. Lord Blanesburgh, in his dissenting opinion in the *Savory Case*, said that such a proposition would strike him as 'extravagant': [1933] A.C. at p. 219.

[6] The London Clearing House was established about 1773. For its history, see P. W. Matthews, *The Bankers' Clearing House* (1921); W. Howarth, *Our Clearing System and Clearing Houses* (1884); W. J. Lawson, *The History of Banking* (1855), pp. 215–216; J. W. Gilbart, *The History and Principles of Banking* (1866), pp. 77–78; and J. B. Martin, *The Grasshopper in Lombard Street* (1892), p. 168.

[7] The name of the presenting banker was essential for two purposes: first, to permit the accounts between bankers to be made up, and, secondly, to enable any unpaid items to be returned.

The courts, however, were reluctant to grant full legal effect to this useful mercantile practice. Indeed, their obstinacy in this respect affords one of the best examples of the occasional unwillingness of the judges to accord recognition to a well-established usage which is of obvious benefit to the business community.[8] The leading case is *Bellamy* v. *Marjoribanks* (1852),[9] which was an action by the drawer of a cheque against his bankers. The plaintiff had crossed the cheque thus : ' Bank of England, for account of the Accountant-General '. The payee struck out this crossing, leaving it, however, perfectly legible, and crossed the cheque a second time with the name of his own bankers, G. & Co. He then paid it into his account with G. & Co., who collected and credited it to his account. Instead of applying the proceeds to the use of the Accountant-General, the payee then fraudulently converted the money to his own purposes. The drawer unsuccessfully sued his bankers for having paid the cheque in the form in which it was when presented to them. Baron Parke was quite emphatic.[10] ' We are, therefore, of opinion ', he said, ' that crossing the cheque with the name of a banker cannot have the effect of restricting its negotiability to such banker alone. To hold it to have this effect would be to render the instrument no longer a cheque. . . . The crossing is a mere memorandum on the face of the cheque, and forms no part of the instrument itself, and in no way alters its effect '.[11]

Having robbed special crossings of their usefulness, Baron Parke turned his attention to general crossings, and strange though it may seem, he gave them his qualified blessing. This part of his judgment reads : ' Bankers are in general persons of great respectability, and, we believe it may be truly said universally, are incapable of lending themselves to any concealment or suppression of the truth, in order to promote or assist fraud. We think, therefore, that it is a matter of great public advantage and benefit, that the custom or usage, which we have already mentioned as being said to exist in point of fact, should be maintained; and we think it well may, without at all improperly trenching upon or restricting the negotiability of cheques. We think the crossing of a cheque is a protection and safeguard to the owner of the cheque, and that, in the event of a banker paying a crossed cheque otherwise than through a banker, the circumstance of his so paying would be strong evidence of negligence in an action against him. . . . No prudent banker would pay a crossed cheque otherwise than to a banker '.[12] It will

[8] See Joseph Chitty, *Bills of Exchange, etc.* (10th ed., 1859), where it is stated (at p. 165) that a practice had become ' very general ' of crossing cheques in consequence of an opinion ' commonly received in the mercantile community, that the negotiability of the cheque was thereby so far restricted that it could be paid to none but a banker'.

[9] 7 Ex. 389.

[10] Pollock C.B., Alderson B. and Martin B. concurred in this judgment.

[11] 7 Ex. at pp. 400–401 and 403.

[12] 7 Ex. at pp. 403–404.

be noticed that a good deal of this judgment savours too much of logicality. Every practice was tested by reference to the god of negotiability on whose high altar business convenience was sacrificed. The ultimate result was that, although it would be, in the court's opinion, strong evidence of negligence for a drawee banker to disregard a general crossing, he could with impunity ignore a special crossing, which he could see quite well had been ruled through. Such decisions are not calculated to impress business men with the usefulness, far less the wisdom, of our courts of law.

Some four years later, the Crossed Cheques Act, 1856, was passed. But this was a half-hearted measure, and did little more than give statutory recognition to Baron Parke's dictum that 'no prudent banker would pay a crossed cheque otherwise than to a banker'. It enacted that 'where a draft on any banker made payable to bearer or to order on demand bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words "and Company", in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker'.

This Act had to be interpreted and applied in *Simmons* v. *Taylor* (1857).[13] The plaintiff drew a cheque upon the defendant payable to 'George Master, Esq., or bearer', and crossed it '& Co.' in the usual way. The instrument went astray in the post and was later presented to the drawee banker by a stranger. By this time, the crossing had been so ingeniously obliterated as to leave no trace, except on a close inspection against a strong light. The banker paid the cheque and was sued by the drawer who maintained that the payment was not one authorised by him. Judgment was given for the defendant. The decision would have been unobjectionable if the court had based it solely on the ground that 'the legislature had not contemplated making the banker responsible in a case like the present'.[14] Most unfortunately, however, the court indulged in some sweeping generalisations which showed little knowledge of the needs of the business community and brought about the immediate intervention of the legislature. In a joint opinion, Cresswell, Williams and Willes JJ. startled the mercantile world with the following observations. If, they argued, a holder may lawfully cross a cheque, 'why should not another holder have a right to erase that, and restore it to the condition in which it was issued?'[15] Having posed that rhetorical question, they reached the conclusion that the crossing on a cheque was not a part of the cheque, and from there they went on to deduce that the erasure of the crossing did not amount to forgery. It followed, of course, from this

[13] 2 C.B. (N.S.) 528; affirmed by Exchequer Chamber, 4 C.B. (N.S.) 463.
[14] *Per* Cockburn C.J., 2 C.B. (N.S.) at p. 540.
[15] 2 C.B. (N.S.) at p. 539.

reasoning that if a drawer crossed a cheque, thereby giving a direction to his bankers to make payment only to another banker, any holder (perhaps even a wrongful holder) could alter this mandate at his own whim and fancy.[16]

These heretical notions were not allowed to last for long. The Crossed Cheques Act, 1858, enacted that a crossing, put upon the cheque either by the drawer or by any subsequent holder, was a material part of the instrument and must not be obliterated, added to, or altered by any person, except it be, where the crossing is in blank, to insert the name of a banker; and that such cheque should not be paid otherwise than to the banker named; or, if the crossing is in blank, to a banker.[17] Any person who obliterated, added to or altered any crossing with intent to defraud was to be guilty of felony and liable 'to be transported beyond the seas for life'.[18] It was also provided that if the cheque, at the time when it was presented for payment did not plainly appear to be crossed, or such crossing to have been obliterated, added to, or altered, the drawee banker was to incur no liability by paying it, or by paying it otherwise than to a banker, or to the banker named in the crossing, respectively, unless in so doing he acted mala fide or with negligence.[19]

It may be said, therefore, that the rules governing the payment of cheques crossed generally or specially were fully developed by 1858, and, although the early legislation has been repealed, it has been substantially re-enacted.[20] The result is that a paying banker disregards a general or special crossing at his peril: if he makes payment otherwise than in accordance with the crossing, he becomes liable to the true owner of the cheque for any loss which the latter

16 Cockburn C.J. delivered a separate judgment. He admitted that, at first, he inclined to the view that a crossing was an integral portion of a cheque. Unfortunately he abandoned his original opinion and 'after considerable hesitation' brought himself to concur in the views of his brethren: 2 C.B. (N.S.) 540–541.

The decision was upheld by the Court of Exchequer Chamber, where Baron Bramwell, when referring to the Act of 1856, said: 'This piece of legislation is an abortive attempt to perform the impossible feat of rendering a draft which upon the face of it purports to be payable to bearer, not payable to him. It is a thing which cannot be done': 4 C.B. (N.S.) 463 at pp. 467–468.

17 Sections 1 and 2. A very thoughtful article in *The Economist* had recommended most of the reforms which were achieved by this Act. See *The Economist*, Vol. XVI, pp. 588–589. The provisions of the statute brought forth a bitter complaint from the general manager of the London and County Bank, who wrote a letter to *The Bankers' Magazine* asserting that the examination of all the crossings on cheques would be a very difficult matter: *The Bankers' Magazine*, Vol. XVIII, p. 519.

18 Section 3.

19 Section 4.

20 The Crossed Cheques Act, 1856, and the Crossed Cheques Act, 1858, were repealed by section 2 and the Schedule to the Crossed Cheques Act, 1876. The sections of the earlier Acts governing the payment of crossed cheques were replaced (with certain minor modifications) by sections 6, 7, 10 and 11 of the 1876 Act. The latter Act was repealed by section 96 and the Schedule to the Bills of Exchange Act, 1882, but the relevant sections were re-enacted (once again with minor modifications) by sections 78 and 79.

thereby sustains.[21] Furthermore, a banker who collects a cheque crossed specially to a banker other than himself will be liable to the true owner for any loss incurred.[22]

These safeguards make it more difficult for a thief to collect the proceeds of stolen cheques which are crossed than those which are uncrossed. There is the obvious practical point that when an open cheque is stolen, the thief is often able to obtain payment before the loss is discovered, whereas if the instrument is crossed there is a valuable time lag of several days whilst the cheque is passing through the clearing system which enables the drawer (if the loss has been discovered) to countermand payment. In practice, the thief almost invariably tries to avoid the risk of passing stolen cheques through a banking account himself. Instead, he attempts to dispose of them to a third party. And it is when he does this that the weakness of general and special crossings is revealed. *Smith* v. *The Union Bank of London* (1875)[23] affords a useful illustration. In that case, a debtor drew a cheque in favour of his creditor, who indorsed it and crossed it with the name of his bankers, the London and County Banking Co. The cheque was then stolen and eventually transferred to C who gave value for it in good faith. He paid it into his account at the London and Westminster Bank, and they presented it to the drawee bank who paid it : in other words, the drawee bank ignored the special crossing. The payee, who claimed to be still the true owner of the instrument, brought an action against the paying banker for conversion, and relied upon the Crossed Cheques Act, 1858 (*supra*), which had enacted that the banker paying a specially crossed cheque shall not pay it to anyone other than the banker named in the crossing. The Court of Appeal (affirming the judgment of the Queen's Bench) held that the plaintiff's action must fail on the ground that he was no longer the true owner of the cheque. Referring to the Act of 1858, the Court of Appeal observed : 'We cannot say that it has by implication restrained the negotiability of the cheque. We must say, then, that the holder of the cheque, the customer of the London and Westminster Bank, who presented it to the defendants, was the lawful holder, entitled to retain it against the plaintiff and all the world '.[24] In short, the precaution which the

[21] As a corollary to this principle, there is the rule that a banker who, in disregard of a crossing, has made payment to someone other than the true owner cannot debit his customer's account. He cannot derive any protection from section 80 of the 1882 Act (replacing section 9 of the 1876 Act) because that section, by its terms, applies only where he has made payment 'in good faith and without negligence' and in accordance with the crossing. Presumably, however, the paying banker cannot lose the money twice; that is to say, if the true owner succeeds in recovering from him the sum wrongly paid in disregard of the crossing, the banker can then debit his customer's account.

[22] Section 82 of the 1882 Act (replacing section 12 of the 1876 Act) protects the collecting banker in respect of his common law liability for conversion. But it applies only where he 'in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself '.

[23] 1 Q.B.D. 31.

[24] 1 Q.B.D. at p. 34. The court was composed of the Lord Chancellor (Lord Cairns), Lord Coleridge C.J., Bramwell B. and Brett J.

payee had taken of crossing the cheque with the name of his bankers proved to be useless. The decision profoundly disturbed the business community : a correspondent in *The Bankers' Magazine* said that the case seemed ' entirely to upset the confidence reposed by all commercial classes in the security of crossed cheques '.[25]

### The Origin of the ' Not Negotiable ' Crossing

The Court of Appeal in *Smith* v. *The Union Bank of London* (*supra*) had drawn attention to the crux of the problem. ' The legislature might have enacted ', they said, ' that anyone taking a crossed cheque should take it at his peril, and get no better title than his transferor had. It has not done so '.[26] The real difficulty was, therefore, that in cases of this type the doctrine of negotiability enabled a bona fide transferee for value to obtain a good title. His interests were in conflict with those of the drawer and the payee, who were both anxious to make use of some kind of instrument which, if lost or stolen, could never be acquired by an innocent third party who could claim to be the true owner thereof. It was not easy to resolve this problem of conflicting interests. A correspondent in *The Economist* suggested that it might be advisable to enact that ' any person taking a cheque, crossed with a banker's name, or & Co. or transverse lines, shall have no better title to it than the person had of whom he took it '.[27] A few weeks later, a Bill was introduced, one of whose objects was to act on these lines and to modify the doctrine of negotiability as applied to crossed cheques. It soon became obvious, however, that there was a sharp division of opinion as to the extent to which the doctrine should be abrogated. The Lord Chancellor (Lord Cairns) proposed to abolish the doctrine in respect only of cheques crossed specially.[28] This proposal was strenuously opposed, in the House of Commons, by a former Governor of the Bank of England, Mr. J. G. Hubbard (later Lord Addington) who pointed out that ' not one crossed cheque out of 100 is crossed " specially " '.[29] He was in favour of withdrawing the attribute of negotiability from all crossed cheques payable to order.[30]

The Attorney-General (Sir John Holker) then intervened with what he called a ' compromise '. His proposal embodied a novel idea, which has provided food for thought for several generations of lawyers, bankers, and students. Briefly, he wished to leave general

[25] *The Bankers' Magazine*, Vol. XXXV, p. 767.
[26] 1 Q.B.D. at p. 34.
[27] *The Economist*, Vol. XXXIV, p. 4.
[28] *Hansard*, Ser. 3, Vol. CCXXVII, cols. 1106–1110.
[29] *Ibid.*, col. 1212.
[30] *Ibid.*, col. 1213. Mr. Hubbard trenchantly attacked the doctrine of negotiability. Thus he said that ' the judgment in the case of *Smith* v. *The Union Bank of London* has exhibited the strength and tenacity of the force of legal traditions, and has shown that lawyers have attached an almost superstitious veneration to what they call the " negotiability of cheques " '. *Ibid.*, col. 1210.

and special crossings alone and to invent an entirely new one, involving as part of the crossing the words ' not negotiable '. A cheque so crossed was to be shorn of the qualities of a negotiable instrument. This proposal was ultimately adopted and became part of section 12 of the Crossed Cheques Act, 1876. When the 1876 Act was repealed by the Act of 1882, the provision was re-enacted by section 81 of the latter Act.

### Doubtful Practical Value of the ' Not Negotiable ' Crossing Today

It is submitted that the ' not negotiable ' crossing has, to a very large extent, proved to be a failure. Sir Mackenzie Chalmers was none too happy about retaining the words when he drafted the 1882 Act. Indeed, he suggested at the time that some such phrase as ' with caution ' or ' with notice ' should be substituted. But he eventually took the view that people had got used to writing the words and were beginning to understand their import. Hence, a further change was undesirable.[31] If people were ' beginning to understand ' the ' not negotiable ' crossing in 1882, one might have thought that by the middle of the twentieth century considerable progress would have been made. Nevertheless, it is the present writer's opinion that less than one person in a hundred who use cheque books could explain correctly the effect of crossing a cheque with these words.[32] Apart from local authorities and large trading concerns which employ competent advisers, the crossing is very seldom used. By far the best solution would have been that advocated with great skill and learning by Mr. Hubbard : all crossed cheques payable to order should have been made non-negotiable by Parliament. This simple rule would have involved no difficulties of terminology, and business men would soon have learnt the elementary principle that they could not obtain any better title to such cheques than their transferors.

Furthermore, there is no doubt that when the Attorney-General laid before the House his proposals for introducing the ' not negotiable ' crossing, he considerably over-stated the effectiveness of his

[31] Sir Mackenzie Chalmers explained his views on this subject to a meeting of the Institute of Bankers. See the *Journal of the Institute of Bankers*, Vol. III (1882), p. 531.

[32] Customers very occasionally inquire from their bank as to the meaning of the ' not negotiable ' crossing. And it must be whispered in a footnote that even then they do not always learn the truth.

The difficulty which the layman experiences when trying to understand the words is that they do not mean what they appear (to him) to say. Considerable misunderstanding results. Thus tradesmen sometimes decline to take from the payee a cheque crossed ' not negotiable ' on the ground that it would be ' illegal '; in other words, they regard ' negotiable ' as synonymous with ' transferable '. It is no answer to these objections to say that legal technicalities of this nature can be left to the lawyers. The drawing of cheques is unlike the drafting of conveyances. The latter is necessarily a technical matter which the layman can place in his lawyer's hands. But the drawing of cheques is an everyday necessity, and the legal rules relating thereto should be simple and straightforward.

scheme. He clearly regarded it as 'a means by which a cheque should be secure from the depredation of thieves and from the carelessness of bankers'.[33] Were his claims justified? Let it be supposed that a cheque crossed 'not negotiable' is stolen. The thief has previously opened a banking account into which he pays the cheque. As soon as the proceeds are available, he withdraws the money and is never heard of again. How does this legislation, in such a case, give 'security'? The true owner cannot sue either the paying or collecting bankers.[34] The only consolation he has is that of knowing that no one ever became the 'true owner' of his cheque. But the thief has made off with the money, and that is what matters.[35]

## A More Satisfactory Safeguard—the 'Account Payee' Crossing

Whilst Parliament, with the assistance of the Lord Chancellor and the Attorney-General, was making none too successful attempts to provide some sort of security for the true owner of a cheque, business men, on their own initiative and without the assistance of the legislature, were devising a better method: they had commenced to cross their cheques with the words 'For the account of . . .' or 'Account payee'. The custom started, apparently, about the middle of the century.[36] Unfortunately, the new practice was badly handled by both Parliament and the judges. When the Crossed Cheques Bill, 1876, was being debated, a member moved to insert words which would have given statutory recognition to the crossing.[37] Posterity will never know what objections were raised to this proposal: *Hansard* succinctly reported 'Amendment, by leave,

[33] *Hansard*, Ser. 3, Vol. CCXXXI, col. 1216.

[34] Assuming, of course, that they can bring themselves within section 60 (or 80) and section 82 of the Bills of Exchange Act, 1882.

[35] Mr. Hubbard wrote to *The Times* immediately after the passing of the Crossed Cheques Act, 1876. After complaining bitterly that the Bill was rushed through its final stages on the last day of the Session, he examined in detail the weakness of the 'not negotiable' crossing. It was his contention that the benefit of the crossing was 'neutralised' by allowing protection to bankers collecting stolen cheques crossed in this way. *The Times*, August 29, 1876, p. 7.

[36] The cheque in *Bellamy* v. *Marjoribanks* (1852) 7 Ex. 389, was crossed 'Bank of England, for account of the Accountant-General'. The use of the words 'Account payee' was almost certainly a later development. By permission of the Institute of Bankers the writer has examined the extensive cheque collection of that body. The earliest cheque crossed with those words in the collection is the one dated October 13, 1897, drawn on Stuckey's Banking Co., Ltd., Shepton Mallet. If this custom had developed about the middle of the century one would have expected at least some of the cheques of that period to bear the new crossing. On the other hand, it must be admitted that most of the instruments in the collection were drawn by private individuals who, even today, make use of the 'Account payee' crossing much less frequently than trading concerns and local authorities.

[37] The Lord Mayor (Mr. Alderman Cotton) moved to insert: 'Where a cheque is crossed generally or specially a lawful holder may add to the crossing the words "for account of", or any abbrevia'ion thereof, followed by the names of the persons or company to whose account he wishes the cheque to be credited'. *Hansard*, Ser. 3, Vol. CCXXX, col. 1515.

withdrawn '. Similarly, the 1882 Act contains no reference to the crossing. Then, in 1891, the Court of Appeal refused the opportunity of holding that the crossing had the effect of making a cheque non-transferable.[38]

The legislation of 1876 and 1882 did, however, open up a new line of development. A banker collecting a crossed cheque was to be protected in respect of his common law liability for conversion provided, inter alia, that he acted ' in good faith and without negligence '.[39] Suppose he accepted a cheque crossed ' Account payee ' for the credit of someone other than the payee. Would the courts regard this as negligence? This question was directly raised, for the first time, in *Bevan's Case* in 1906.[40] But the facts were exceptional, and, as will be shown shortly, the case would probably be decided differently today. The action was brought by a Mr. Bevan, who was the sole proprietor of a business carried on under the name of Malcolm Wade & Co. A man named Malcolm Wade was, in fact, employed by Mr. Bevan as the manager of the business. Wade opened two banking accounts in his own name, one with the National Bank, and the other with the Capital and Counties Bank. From time to time he misappropriated cheques payable to ' Malcolm Wade & Co. ' and paid them into these two private accounts. Some of the cheques were crossed ' Account payee ', and so it became necessary for the court to decide, in the first place, whether the collection of a cheque so crossed for a person other than the payee named could amount to negligence, and secondly, whether, on the facts of this particular case, the defendant bank had been negligent. On the first point, it was held that to disregard such a crossing ' if the banker had information which might lead him to think that the account into which he was paying the amount was not the payee's account ' would be negligence.[41] Turning, however, to the facts of the case, the learned judge took the view that ' there was no negligence in accepting Wade's statement that he was Malcolm Wade & Co., especially as they [the defendant bank] had no means of making any inquiry upon the matter '.[42] Today, of course, it would be different, because the banker should satisfy himself as to the

[38] *National Bank* v. *Silke* [1891] 1 Q.B. 435. The Court of Appeal held that a cheque payable to the order of M and crossed ' Account of M, National Bank ', did not contain words prohibiting transfer within section 8, Bills of Exchange Act, 1882. To the same effect, see Atkin L.J. in *Importers Company, Ltd.* v. *Westminster Bank, Ltd.* [1927] 2 K.B. 297 at p. 309.

[39] Section 82, Bills of Exchange Act, 1882, re-enacting section 12, Crossed Cheques Act, 1876.

[40] *Bevan* v. *The National Bank, Ltd.*, *Bevan* v. *The Capital and Counties Bank, Ltd.* (1903) 23 T.L.R. 65. In the earlier case of *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank* [1904] 2 K.B. 465, the Economic Bank had collected crossed cheques for a customer who had no title thereto. The Economic Bank specially crossed the cheques to its clearing agent, Williams Deacon's Bank. Beneath the special crossing were the words ' Account Economic Bank '. It was unsuccessfully argued that this was an unlawful addition to the crossing.

[41] 23 T.L.R. at p. 68

[42] *Ibid.*

ownership of the business by asking to see the certificate issued, in such a case, under the provisions of the Registration of Business Names Act, 1916.[43]

In *House Property Co. of London, Ltd.* v. *London County and Westminster Bank* (1915),[44] another claim was made against a collecting bank in respect of a cheque crossed 'Account payee'.[45] On this occasion, the cheque was drawn in favour of a named payee or bearer, and the bank had accepted it, without inquiry, for the credit of N, a third party. Counsel for the bank argued that as the instrument was a bearer cheque, the defendants did in fact collect it for the account of the payee, who was the bearer. But Rowlatt J. refused to accept this. 'I am bound to say', he observed, 'that this is a somewhat shallow argument, because, on the meaning of this document I cannot in the least doubt that "a/c payee" does not mean the account of the man who in the process of negotiation is the owner of the cheque at the time it is collected . . . "Payee" as written across the face of this cheque means the named payee on the cheque as drawn'.[46] In view of the fact that the bank had not asked for any explanation, the learned judge had no difficulty in holding that it had been negligent and so had forfeited the protection of section 82 of the Bills of Exchange Act, 1882.[47]

There can be no doubt that the 'account payee' crossing is the most satisfactory safeguard so far devised to prevent the

[43] For an example of a case where a banker very wisely requested to inspect the appropriate certificate, see *Smith and Baldwin* v. *Barclays Bank* (1944), reported in the *Journal of the Institute of Bankers*, Vol. LXV, p. 171.

[44] 84 L.J.K.B. 1846.

[45] Two earlier cases had also been concerned with cheques crossed 'Account payee': *Morison* v. *London County and Westminster Bank, Ltd.* [1914] 3 K.B. 356, and *Ladbroke & Co.* v. *Todd* (1914) 19 Com.Cas. 256. But in *Morison's Case* the cheques were paid into the designated account, and in *Ladbroke's Case* a thief opened an account in the name of the payee. In neither case, therefore, did the bank knowingly collect for someone other than the named payee.

[46] 84 L.J.K.B. at pp. 1847–1848.

[47] In *Underwood (A. L.), Ltd.* v. *Bank of Liverpool and Martins* [1924] 1 K.B. 775, the defendant bank had collected many cheques payable to A. L. Underwood, Ltd., for the private account of its sole director, Mr. Underwood. Some of the cheques were crossed 'Account payee'. In his judgment, Scrutton L.J. said: 'I agree with the view of Rowlatt J. in *House Property Co.* v. *London County and Westminster Bank* (1915) 84 L.J.K.B. 1846, that when such a cheque is paid into the account of a person who is not the payee the bank is put on inquiry': [1924] 1 K.B. at p. 794.

Unfortunately there is an observation of Atkin L.J. in *Importers Company, Ltd.* v. *Westminster Bank, Ltd.* [1927] 2 K.B. 297 at p. 309, which, if it correctly states the law, imposes a much heavier burden on the collecting banker than merely the making of reasonable inquiries. He said: 'I agree that there is a duty upon the bank which takes a cheque in those circumstances to see that, in fact, they are collecting the money for the account of the payee, and that the proceeds, when received, will go to the payee'. Probably, however, this dictum places the duty too high. Cf. Chorley, *Journal of the Institute of Bankers*, Vol. LX (1939), p. 408.

misappropriation of cheques inasmuch as it places a heavy responsibility upon the collecting banker.[48] But, in practice, the crossing (like the 'not negotiable' one) is seldom used by private individuals. And in those cases where it is employed, the crossing is a constant source of embarrassment to collecting bankers. It is often a nice question how careful and thorough their inquiries ought to be to exonerate them from negligence under section 82. Furthermore, the result of the inquiries, if they are to be of any use should trouble arise, ought to be recorded in the form of a minute—an intolerable burden in a busy office.[49] Although greater safety would result from a widespread use of the crossing, the additional work involved when cheques so crossed were tendered for accounts other than those of the payee would be most unwelcome to the banks. One final objection may be noted: it has never been judicially decided whether a paying banker should refuse payment of a cheque crossed 'account payee' if it bears indorsements in addition to that of the payee.[50]

### A Non-Transferable Mandate Required

The historical development of the subject makes it clear, therefore, that the two attributes of a cheque which render it unsatisfactory as a safe means of payment are its transferability and its negotiability.[51] These qualities in a bill of exchange were highly prized, and, at first sight, it might seem illogical that one should wish to dispense with them in the case of cheques, which are admittedly merely a special type of bill.[52] The apparent paradox is easily explained. Negotiable instruments have served two main purposes: first, as a means of payment, and, secondly, as a form of currency. The currency aspect was vitally important in the case of bills, for it was essential that a bona fide transferee for value should be capable of obtaining a perfect title to the instrument in spite of defects in the title of prior parties: hence the necessity for the

[48] The drawer would be well advised to add the words 'not negotiable' to his 'account payee' crossing. Both serve separate and distinct purposes. A cheque bearing only the 'account payee' crossing is still a negotiable instrument (*National Bank* v. *Silke* [1891] 1 Q.B. 435, though the judgments on this point are largely obiter), whereas an instrument crossed 'not negotiable' is deprived of the quality of negotiability. On the other hand, a cheque crossed 'not negotiable' will be collected for a person other than the payee without inquiry; whereas if a banker collects an instrument crossed 'account payee' without making reasonable inquiries, for a person other than the payee, he acts at his peril.

[49] It is not surprising that the banks have never directly encouraged the use of the crossing, as, for example, by notices in their pass books and cheque books or by press advertisements.

[50] Probably he runs no risk in making payment. For a learned discussion on this point see Chorley, *Journal of the Institute of Bankers*, Vol. LX (1939), pp. 404–405.

[51] This is subject to the reservation that the instrument can be made 'not negotiable' by crossing it with those words. As will be shown later, it is also theoretically possible to make it non-transferable.

[52] 'A cheque is a bill of exchange drawn on a banker payable on demand': section 73, Bills of Exchange Act, 1882.

doctrine of negotiability.[53] One of the greatest masters of the law of negotiable instruments declared, in his judicial capacity, that 'the object of the law merchant, as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore honest acquisition confers title'.[54]

A cheque, on the other hand, seldom passes from one person to another under modern conditions. And in those cases where it does pass from the payee to another party, the result, from the drawer's point of view, is sometimes extremely unpleasant. Little does he realise the possible consequences of launching upon the world a negotiable instrument. Let it be supposed, for example, that he has drawn a cheque in payment for certain goods, which prove to be unsatisfactory. When he countermands payment of the cheque, he is usually quite unaware of the fact that he had put his signature to an instrument in respect of which a good title might be obtained by a bona fide transferee for value.[55] His surprise, consternation, and fury, when he is apprised of the true position, leave one in no doubt as to his views on the suitability or otherwise of a negotiable instrument for the purpose of settling debts. He would unreservedly agree with Lord Chorley who, in his Gilbart Lectures, said that 'there are rather weighty objections to using an instrument which is negotiable' for the purpose of making payments from one person to another.[56]

It is submitted, therefore, that the needs of the business community for a method of making remittances without risk ought to be provided by the introduction of a non-transferable mandate. It is true that, even under the existing law, a well-informed customer could devise such an instrument for himself. He could use an ordinary cheque form and fill it in thus: 'Pay X only'. But there are several legal and practical objections to this method of drawing cheques as the law stands at the moment. The first difficulty which arises is that, unless the words 'or order' are deleted, the instrument will then read: 'Pay X only or order'. The legal effect of this type of ambiguous mandate is uncertain. Thus, it

[53] Moreover, the currency aspect is still of vital importance today in the case of the commonest of all negotiable instruments, namely, Bank of England notes. It is not difficult to imagine the chaos which would result if ever the doctrine of negotiability ceased to apply to them.

[54] *Per* Byles J. in *Swan* v. *The North British Australasian Company, Ltd.* (1863) 2 H. & C. 175 at pp. 184–185.

[55] He might be met with a similar claim if the cheque had been lost, provided that, when lost, it was payable to bearer (either originally or as a result of indorsement in blank).

[56] *Journal of the Institute of Bankers*, Vol. LX (1939), p. 392. The customer's next reaction is to ask how he can avoid such a catastrophe in the future. One solution is, of course, the 'not negotiable' crossing. The present practice of the banks is to supply customers with either open cheques or cheques crossed generally. In fact, some customers like to have both types of cheques. It would be a very wise precaution if the banks had all their *crossed* cheques crossed 'not negotiable'. But the practical difficulty would be to explain the meaning of the 'not negotiable' crossing to many thousands of customers. As it is, they learn by the bitter experience of trial and error.

was the view of the late Sir John Paget that if the words ' or order ' appear on the instrument, it remains transferable and ' no words prohibiting transfer or indicating an intention that it should not be transferred have any place thereon or any effect on its negotiability '.[57] If this is correct, it would mean that no effect whatever would be given to the word ' only '—a result which, with great respect, would appear to be extremely improbable. It is suggested that the better view is that advanced by Lord Chorley, namely, that it is ' arguable that since the word " only " would appear in ink, while the words " or order " would appear in print, the rule of construction by which written words take precedence of printed words with which they are inconsistent would apply '.[58]

Let it be assumed, however, that the drawer is mindful of this difficulty. Suppose that he fills in his mandate to read ' pay X only ', and deletes the words ' or order ', authenticating the alteration by initialing it. An instrument of this type is expressly provided for by section 8 (1) of the Bills of Exchange Act, 1882, which enacts that ' when a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable '.[59]

There can be little doubt that, from the point of view of the drawer and the payee, an instrument of this nature would provide the highest standard of safety which it is possible to achieve. Why is it, then, that such an order is very seldom used? The short answer undoubtedly is that not one customer in ten thousand knows anything about the merits of a non-transferable mandate. Furthermore, it is most unlikely that bankers, with the law as it stands at the present day, would ever think fit to advise their customers to draw cheques in this way.[60] No protection against liability for conversion is available to the paying banker in respect of such instruments: neither section 60 of the Bills of Exchange Act, 1882, nor section 19 of the Stamp Act, 1853, affords any relief, because each section applies only to instruments payable to order.[61] Therefore, whenever a banker is confronted with

[57] Paget, *Law of Banking* (4th ed., 1930), p. 114.

[58] Chorley, *Journal of the Institute of Bankers*, Vol. LX (1939), p. 411. There are some observations of Lindley L.J. in *National Bank* v. *Silke* [1891] 1 Q.B. 435 at p. 439, which have some bearing on this matter; but, as the case was concerned with an ' account payee ' crossing, the passage is necessarily obiter in relation to the present problem. ' I will assume,' he said, ' for the purposes of this case that . . . you can draw a bill expressed to be payable to order or to bearer, and yet make it not transferable; though I am disposed to think that you cannot. But if you can, there must be plain words prohibiting transfer or showing an intention that the bill shall not be transferable. Ambiguous words will not do.' See also Fry L.J.'s judgment at pp. 439–440.

[59] Apparently ' negotiable ' in this subsection is synonymous with ' transferable '. Cf. Paget, *Law of Banking* (5th ed., 1947), p. 116.

[60] Indeed, in those very rare cases where a customer commences to issue instruments of this type he is, as a rule, courteously requested to abandon the practice.

[61] But if the instrument was crossed, the paying banker might be able to rely on section 80, Bills of Exchange Act, 1882.

such an order, he must take special precautions: if the instrument is presented over the counter, he ought to insist on proof of identity of the payee, and, if it is presented by another banker, presumably he ought to request that banker to certify that the payee's account has been credited.

The question arises, therefore, whether a suitable non-transferable mandate can be drafted within the framework of the existing law. Various suggestions along these lines have been made in recent years.[62] Of particular interest is the proposal for a new type of mandate made by Mr. G. O. Papworth, in *The Banker* for July, 1949. The order which he has devised is worded as follows: 'To Lombard Bank Limited, Barchester. PAY the Banker presenting this order for account ONLY of .... the sum of ....'.[63] It also bears on its face the words 'This Order is NOT TRANSFERABLE. Endorsement is not required'. Mr. Papworth states that this type of order would not need indorsement but only the customary 'branding' by the rubber stamp of the collecting bank. 'It would rely', he adds, 'upon the contractual liability inherent in the customer's mandate to enforce observance by both paying and collecting banker'.[64] As Mr. Papworth rightly claims, the abolition of indorsements would save a great deal of labour which is expended daily, on the one hand, by those who have to make them, and on the other, by paying and collecting bankers.

One cannot help thinking, however, that if it is desired to abolish indorsements, this end could be attained by much simpler means. Could not the Clearing Banks reach an agreement among themselves that, whenever cheques payable to order are collected for the account of the payee, no indorsement would be required by them? In other words, indorsement would be necessary in two cases only, *viz.*, (i) when the payee presents the cheque for payment in cash, and (ii) when he wishes to negotiate the instrument to a third party. In order to implement this proposal, the banks would exchange indemnities with each other. The collecting banker would make himself responsible for ensuring that, whenever he collected a cheque bearing no indorsement, the account of the payee was in fact credited; and he would therefore agree to indemnify the paying banker in the event of his becoming liable to his customer for having

[62] See L. Hitchcock, 'Endorsements—A Suggestion', *The Bankers' Magazine*, Vol. CXXXVII (1934), pp. 595–598; W. Borrowdale, 'Dispensing with Endorsements', *The Bankers' Magazine*, Vol. CXXXVIII (1934), pp. 39–42 (for a reply to these two articles see M. Megrah, 'Endorsements', *Journal of the Institute of Bankers*, Vol. LV (1934), pp. 388–392); J. Mead, 'Is the Cheque Obsolete', *The Banker*, Vol. LVII (1941), pp. 191–197; Wynter Ridley, 'Endorsement Unnecessary', *The Bankers' Magazine*, Vol. CLXVII (1949), pp. 469–472; and G. O. Papworth, 'Endorsements Must Go', *The Banker*, Vol. XCI (1949), pp. 24–27.

[63] A specimen of the instrument will be found in *The Banker*, Vol. XCI, p. 25.

[64] *The Banker*, Vol. XCI, p. 27.

made payment to someone other than the true owner.[65] A change of practice on these lines could easily be effected. The usual form of order cheque would bear on its face the following words : ' This cheque requires to be indorsed by the person to whom it is payable, unless it is paid into that person's banking account '.

Nevertheless, the present writer takes the view that any proposal to abolish indorsements would be unlikely to meet with the approval of the business community as a whole. It is a matter of common experience that more and more business men want their creditors to acknowledge remittances by a simple signature on the remittance itself : in other words, they wish the payee's indorsement to be treated as a receipt. The receipt is usually printed on the back of the instrument and is commonly worded as follows : ' Received from the drawer the sum specified on the face hereof '.[66] Neither Mr. Papworth's scheme nor the present writer's alternative suggestion could be harmonised with this desire : creditors would be obliged to send separate receipts to their remitters—a procedure which involves considerable clerical labour and expenditure on stationery and postage.[67]

Moreover, from the banker's point of view, there are serious objections to the abolition of indorsements. Mr. L. C. Mather has pointed out that cases might occur where, upon the return unpaid of an order for a common round figure, the collecting banker would have trouble in convincing a customer that the item had been correctly debited to his account. Furthermore, the banker might experience difficulty in applying an unpaid order. ' A branch ', wrote Mr. Mather, ' might have two customers, say, John White and James White. If it collected for each customer on the same day an order for £5 but both orders were drawn in favour of J. White, how (without detailed record necessitating more work) could it decide in the absence of any indorsement which account to debit if one of the orders was returned unpaid ? '[68]

[65] This might arise, for example, where a cheque payable to John Smith had been stolen and was collected for the account of another person of the same name. As the cheque would be unindorsed, the paying banker would, of course, derive no protection from section 60, Bills of Exchange Act, 1882.

[66] Frequently a memorandum is added that ' This receipt must be signed by the payee; no further indorsement is necessary '. The receipt will attract the usual twopenny stamp duty if the amount is two pounds or over, unless, of course, the transaction is exempt from duty, as in the case of payment of salary or wages.

It is impossible to say precisely when receipts on cheques were first used. The earliest trace of them in the law reports is to be found in *Bavins* v. *London & South Western Bank* [1900] 1 Q.B. 270. In 1907 Sir John Paget, when addressing a meeting of the Institute of Bankers, referred to them as ' new-fangled documents which ape the form of cheques '. *Journal of the Institute of Bankers*, Vol. XXVIII, p. 227.

[67] It may be noted that in the United States a cheque is universally accepted as prima facie evidence of payment : separate receipts are seldom given.

[68] *The Banker*, Vol. XCI (1949), p. 189. Mr. Mather is an assistant general manager of the Midland Bank, Ltd. At the time of writing his article he was the principal of the Bank's Legal Department.

Mr. Papworth wrote a second article in which he replied to this point in the

Although the present writer agrees with Mr. Mather's view that it would be unwise to introduce a new form of instrument which would not require indorsement, it is submitted that some safer means of payment than the present-day form of cheque could, and should, be introduced.[69] The type of order which, it is suggested, would meet the needs of the majority of business men would be printed 'Pay . . . ONLY'. On the reverse would be a form of receipt worded: 'Received from the drawer the amount specified on the face hereof'. The instrument would be crossed and would also have on its face the words 'This Order is NOT TRANSFER ABLE and can be collected only through a banker. The receipt on the reverse requires the payee's signature'.

### Legislation Necessary

The following problems arising out of the introduction of a new instrument of this nature should, it is submitted, be solved by legislation:—

1. In the first place, the paying banker ought to be fully protected against the risk of claims for conversion.[70] This problem should be approached from two angles. First, it should be made *unlawful* for a collecting banker to accept a non-transferable cheque for an account other than that of the payee[71]; and, secondly, an express provision (similar to that contained in section 60 of the 1882 Act) should exonerate the paying banker from liability where payment has been made 'in good faith and in the ordinary course of business'.

   It may be added that Mr. Papworth's proposal with reference to the 'non-transferable' order which he devised was quite different. He said that 'in suitable—and exceptional—cases, these non-transferable orders could be collected for someone other than the named beneficiary,

following terms: 'As for the rather far-fetched case, which Mr. Mather cites, of the difficulty of debiting to the right account a returned cheque payable to one of two different customers but with duplicated names, who had previously been credited with the same round amount on the same day, it must surely be observed that even today mistakes are not unknown in applying cheques or credits; but these occasional errors are adjusted amicably. The risk is not increased by the proposed new order': *The Banker*, Vol. XCII (1949), p. 48. With respect, the risk *is* increased by a form of order which bears no indorsement; if the order is indorsed, the handwriting indicates which account should be debited.

69 *Contra* Mr. Mather, who concluded his article by stating that 'ample efficient means of payment through banking channels are available to customers without further complicating the already complex business of the banker': *The Banker*, Vol. XCI (1949), p. 191.

70 The present unsatisfactory position of the paying banker when paying instruments in favour of 'X only' has been considered *supra* p. 46.

71 A penalty should be provided for in the Act in the event of non-compliance with this rule by the collecting banker; he would also be liable in damages for conversion in respect of any loss sustained by the true owner.

just as cheques marked "a/c payee" are today'.[72] One feels, however, that any extension of 'a/c payee inquiries' would not be welcomed by bankers. The non-transferable order should be kept strictly non-transferable.

2. Secondly, the receipt form on the reverse of the instrument gives rise to the following problem. A signature, it is said, cannot serve the double purpose of receipt and indorsement.[73] If this is so, then the completion of the form of receipt by the payee leaves the cheque still unindorsed. Accordingly, at the present day, paying bankers invariably take the precaution of obtaining indemnities from such of their customers as wish to use cheque forms with receipts printed thereon.[74] Legislation is clearly required to overcome this difficulty and to render the taking of these indemnities unnecessary.
3. Thirdly, it is suggested that the opportunity should be taken of abolishing the stamp duty on *all* receipts. To make good the loss of revenue, the duty on *all* cheques could, if desired, be increased to fourpence.[75]

The reason for wishing to abolish the stamp duty on receipts is to eliminate a certain amount of difficulty which would undoubtedly arise in connection with the proposed form of receipt on non-transferable orders. The intention is, of course, to print the receipt form on every such order, and there may well be cases where the drawer does not actually require a receipt or where the transaction is already exempt from duty under the existing law. Instances of this nature would certainly cause confusion, because the drawee banker would never know whether or not the receipt should be stamped. Hence, the simplest course is to abolish the duty on receipts.[76]

[72] G. O. Papworth, 'Endorsements Must Go', *The Banker*, Vol. XCI (1949), p. 27.

[73] The Council of the Institute of Bankers took the opinion of Sir John Paget on this point. 'In my opinion', wrote Sir John, 'no signature, whether on the back or face of the cheque, which is primarily or partially the signature of a receipt, is or purports to be an endorsement within the meaning of the term as used in the Bills of Exchange Acts'. *Journal of the Institute of Bankers*, Vol. XL (1919), p. 312.

[74] It has been questioned whether these indemnities are always effective. A former Secretary of the Institute of Bankers suggested that they might be ultra vires the companies or other statutory bodies which gave them. Ernest Sykes, 'Cheques with Receipt Forms Attached', *Journal of the Institute of Bankers*, Vol. XL (1919), pp. 310–313.

[75] The stamp duty on cheques yielded £6,125,775 in 1947–48, and the estimated amount of revenue from the duty on receipts was £4,245,074: see Cmd. 7738 (1949). One would like to see both these duties abolished, but it is unlikely that any Chancellor of the Exchequer would be prepared to dispense with duties which are so easily collected and which bring in over ten million pounds per annum. Perhaps it would suffice if the duty on cheques was increased to threepence instead of fourpence as suggested in the text.

[76] Quite apart from the point in the text above, the present practice of stamping two separate instruments (or worse still, the back and front of the same instrument) with a twopenny stamp seems absurd.

Independently of the reforms already suggested, a strong case exists for the amendment of section 82 of the Bills of Exchange Act, 1882. It will be recalled that this section affords protection to the collecting banker against conversion claims in respect of crossed cheques only. Open cheques are outside its ambit. This is simply a historical accident and cannot be defended on any logical grounds.[77] As long ago as 1906, when the Bills of Exchange (Crossed Cheques) Bill was before Parliament, the perfectly reasonable suggestion was made that the protection of the section should be extended to uncrossed cheques. One is amazed to find, however, that the proposal was strenuously opposed by no less an authority than the late Sir John Paget.[78] Although Paget felt bound to concede that 'no doubt there is in actual practice as great an obligation on a banker to collect uncrossed as crossed cheques for his customer', nevertheless, in his view, a distinction ought to be drawn, because 'the compulsion arises purely from custom, convenience, and competition; it has no origin or warrant or necessity derived from legislation, and protection in such case would therefore not be justified by any logical ground or compulsory commensurate risk . . .'.[79] With great respect, this line of thought is very difficult to follow.[80]

[77] The protection was first conferred by section 12, Crossed Cheques Act, 1876. It will be remembered that the Lord Chancellor proposed to abolish the doctrine of negotiability in respect of cheques crossed specially, *supra*, p. 39. At the same time he was in favour of conferring protection upon a banker who, in good faith and without negligence, received payment for a customer of such a cheque: *Hansard*, Ser. 3, Vol. CCXXVII, cols. 1106–1110. The Lord Chancellor rightly said that 'the risk of liability for conversion is greater when one is dealing with a non-negotiable instrument'. Then came Mr. J. G. Hubbard's suggestion (*supra* p. 39) and finally that of the Attorney-General whose idea it was that only those cheques bearing the new 'not negotiable' crossing should be shorn of the quality of negotiability. He was in favour of conferring protection upon bankers in respect only of cheques so crossed: *Hansard*, Ser. 3, Vol. CCXXXI, col. 1216. As has already been shown, his proposal to introduce the 'not negotiable' crossing was accepted. But the section, in its final form, gave protection to bankers collecting *any* type of *crossed* cheque. This was illogical, because the risk of liability for conversion is just as great when one is collecting open cheques as it is when collecting generally or specially crossed cheques. The 1876 Act was, of course, exclusively concerned with crossed cheques, and that appears to be the reason why protection was withheld from bankers in respect of open cheques.

[78] In the course of his Gilbart Lectures for 1907, Sir John said: 'But there never was an Act of Parliament which went far enough to please everybody, or did what everybody wanted done. While this little Act [the Act of 1906] was still on its way through Parliament, there were suggestions for the extension of its purview. . . . One daring proposition was to extend the protection of Sect. 82 to all cheques, whether crossed or not. As you know, I am heart and soul for the bankers, but I must say, that is a proposal I could not support. I still adhere to the old doctrine of limiting the banker's special privileges, his exemption from the risks attending ordinary mortals, to those cases where such protection is commensurate with some risk forced upon him by the law of the land'. *Journal of the Institute of Bankers*, Vol. XXVIII (1907), p. 226.

[79] *Journal of the Institute of Bankers*, Vol. XXVIII, pp. 226–227.

[80] It would be just as reasonable to inform a tight-rope walker that a net will be stretched beneath him for only half the length of his walk. If he falls at the protected part, he will be saved; if at the unprotected part, he will perish.

The absurdity of the situation may be illustrated by supposing that a customer pays in for the credit of his account four cheques, to none of which he has a good title. Two are crossed, and two are open. As the law stands at the moment, the banker is protected in respect of the former (provided that he satisfies the requirements of section 82), but is liable to the true owner in respect of the latter. This is law making at its worst.

### Obstacles to be Overcome

It is not denied that there are certain practical difficulties which these suggested reforms would involve—particularly in connection with the introduction of non-transferable cheques. There is, for example, always the possibility that the payee of such an instrument may have no banking account. Probably, however, there are few payees of cheques today who have no account either with a joint-stock bank, the Post Office Saving Bank, a trustee savings bank or a co-operative society. Furthermore, it is not suggested that the present form of cheque should be prohibited.[81] There are certain transactions (such as salary and wage payments) where an open cheque is the best method of payment. In these instances, and in others where the creditor so stipulates, payment could be made by using the present form of cheque.[82]

The real obstacle to be surmounted, however, is parliamentary *vis inertiæ*. But this is something which can be overcome when the mercantile world is really in earnest. If a short Act was passed to facilitate the introduction of a non-transferable order of the type discussed in the preceding pages, there is little doubt that the mercantile community would benefit: business men would be provided with a method of making remittances free from risks of loss and theft, and collecting bankers would be freed from most of the risks inherent in the collection of open and crossed cheques today. They would not regret that 'the old order changeth, yielding place to new'.[83]

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[81] Bankers would be obliged to keep on hand stocks of both transferable and non-transferable cheques. But this is a small price to pay to insure against the heavy losses noted at the beginning of this article.

[82] An ingenious suggestion for providing on the one form a non-transferable and a transferable mandate was made by Mr. J. Mead in *The Banker* for October, 1949. He has drafted a new type of order worded as follows: '1. Pay . . . ONLY through any Bank, *or* 2. Pay . . . *or order* in cash the sum of . . .'. In order to enlighten customers in the use of such instruments, Mr. Mead would have the following instructions printed on the cheque books: 'Order No. 2 is not effective if it is deleted OR if this draft is CROSSED. Customers are advised that the Bank is not responsible for identifying payee before payment if Order No. 2 is used. If you give Order No. 2 delete Order No. 1 and do not cross'. *The Banker*, Vol. XCII, pp. 49–51. The idea is attractive, though one feels that many customers would need more guidance than the proposed instructions on the cheque books.

[83] Tennyson, *The Passing of Arthur*.

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# THE ROYAL MARRIAGES ACT, 1772[1]

In 1936 an American *divorcée*, Mrs. Simpson, brought the Royal Marriages Act to the public notice. Although on that occasion it was probably not applicable, as it is extremely unlikely that it applies to the reigning sovereign,[2] the Act came in for considerable criticism.[3] The purpose of this article is to show that it can be criticised on the fundamental ground that it no longer applies to any member of the Royal family in anything like close proximity to the Crown, if indeed, it now applies to anyone.

Early in 1950 another American *divorcée*, also called Mrs. Simpson, married in America another descendant of George II, the third Marquess of Milford Haven.[4] It appears that no formal consent of the King in Council was given to this marriage.[5] Since it was decided in the *Sussex Peerage Case*[6] that the mere fact that the marriage took place abroad is not enough to take it out of the statute, the validity of the marriage must depend upon the Marquess coming within the exempting clause, 'other than the issue of princesses who have married, or may hereafter marry into foreign families'.[7] While there can be no possible doubt that he does so, as his descent from King George II is through such a princess,[8] it is suggested that these words of exemption are so loosely drafted that they exclude the majority of the living members of the Royal family from the operative portions of the Act.

The Royal Marriages Act was passed—not without protests[9]—at

[1] 12 Geo. III, c. 11; 4 Halsbury's Statutes, 188.

[2] Since the consent must be given under the Great Seal and passed in Council (s. 1), the contrary view is not so absurd as it appears at first sight. The monarch is within the words 'descendant of George II' (*idem*), but the Preamble (*infra*), shows that Parliament clearly had in mind only the other members of the Royal family. The King is not bound by a Statute unless expressly referred to (*Magdalen College Case* (1615) 11 Co. Rep. 66b, 68b; 1 Blackstone's *Commentaries* (14th edn.) 262).

[3] For a layman's view see Mackenzie, *The Windsor Tapestry* (1938).

[4] *The Times*, February 6, 1950, p. 5.

[5] It is customary to announce such consents in the *Court Circular* and in the *London Gazette*.

[6] (1844) 11 Cl. & Fin. 85.

[7] Section 1.

[8] His great-grandmother was Princess Alice (1843–1878), second daughter of Queen Victoria. She married the Grand Duke of Hesse. It appears to be irrelevant that the Marquess, like his father and grandfather, is a British subject domiciled in England. The genealogical information in this article has been verified from the *Peerages* of Burke and Debrett (1949 editions) and, where appropriate, from the *Almanach de Gotha* (various editions). For some of the earlier connections see Townend, *The Descendants of the Stuarts*, 2nd edition, 1858.

[9] 'The passing of this Act was strongly oppósed.' (Erle C.J. as junior counsel in the *Sussex Peerage Case*, at p. 140.)

the urgent recommendation of King George III, whose younger brothers had recently made what he considered to be unsuitable marriages,[10] as he feared that his young sons might do even worse.[11] It appears to have been drafted with excessive celerity and insufficient attention to then comparatively remote contingencies, which have, in the writer's view, now occurred.

The Preamble recites, 'that marriages in the royal family are of the highest importance to the State, and that therefore the Kings of this realm have ever been entrusted with the care and approbation thereof'.[12] The statute is, 'more effectively to guard the descendants of . . . King George II . . . from marrying without the approbation of (his) Majesty, (his) heirs and successors, first had and obtained'.

Section 1 enacts that 'no descendant of the body of his late Majesty King George the Second, male or female (other than the issue of princesses who have married, or may hereafter marry, into foreign families), shall be capable of contracting matrimony without the previous consent of his Majesty, his heirs or successors, signified under the great seal, and declared in council, (which consent, to preserve the memory thereof, is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council), and that every marriage, or matrimonial contract, of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever'.

In no respect is the statute so open to criticism as in the concluding words of this section. 'This high-handed measure, which bastardises the issue of such marriage, instead of, as it might well have done, merely declaring them incapable of succeeding to the

[10] William Henry, Duke of Gloucester and Edinburgh (1743–1805) had married in 1766 Maria, Dowager Countess Waldegrave, a natural daughter of Sir Edward Walpole. Henry Frederick, Duke of Cumberland and Strathearn (1745–1790) in 1771 married Lady Anne Horton, a commoner's widow.

[11] With reason. George, Prince of Wales, 'married' Mrs. Fitzherbert, in violation of the Act, December 15, 1785. (*The Complete Peerage*, III, 450, note (*d*).) The sixth son, Augustus, Duke of Sussex (1773–1843) twice so 'married'. All the other sons, except the Duke of Cambridge (1774–1850), lived openly with mistresses. When William IV came to the throne he created his 'Dearly beloved natural Son' an Earl (*loc. cit.* IX, 429).

[12] At common law the King of England had the care and approbation of the marriages of his children and grand-children by sons, and of the heir presumptive. This was unanimously decided to be the law by the judges in 1772. (*Lord's Journals*, February 22.) His control over the remoter members of the royal family was vague and undefined. But it is very important to notice that the want of the King's approbation previous to the passing of the 1772 Act did not invalidate the marriage, but merely rendered the parties liable to punishment for contempt of the royal authority. (VI Halsbury's *Laws of England*, 2nd ed., 442, note (*m*).) Thus, when Henry VIII's sister, Queen Mary (1498–1533) remarried without his leave, her husband, the Duke of Suffolk, had to pay over £24,000 to the King. (*Dictionary of National Biography*, vi, 219.) When a common law right of the Crown is re-enacted by statute *sub condicione*, the Crown cannot rely on its common law right to act *sine condicione*. (*Att.-Gen.* v. *de Keyser's Royal Hotel, Ltd.* (1920) A.C. 508.)

throne, or even to any title of honour, was very clumsily drawn by Mansfield, Thurlow and Wedderburn '.[13] That bastardisation was in fact the result of the statute is abundantly clear on the wording of this section. It was also so held in the *Sussex Peerage Case*.[14] Even the intensely autocratic ruling houses of the Continent admitted the validity of an agnate's marriage without the Sovereign's consent, but such a marriage, being morganatic, gave no rights of succession to its issue.[15]

Section 2 provides a loophole of escape for those caught by the previous section, if, being above the age of twenty-five years, they wish 'to persist in (their) resolution to contract a marriage disapproved of, or dissented from, by the King'. They may in such circumstances give twelve months notice of their intended marriage to the Privy Council. If during that time both Houses of Parliament have not expressly declared their disapprobation of the intended marriage—which is perhaps unlikely—the ceremony may take place and the marriage will be valid. The words of the section being in no way qualified, it seems that the issue of such a marriage could succeed to the throne. Rather curiously, this door of grace does not seem ever to have been employed.

Section 3 makes everyone present at a ceremony in violation of section 1, *ipso facto* guilty of *praemunire*:

'Every person who shall knowingly or wilfully presume to solemnise, or to assist or be present at the celebration of any marriage with any such descendant, or at his or her making any matrimonial contract, without such consent as aforesaid first had and obtained, except in the case above mentioned,[16] shall, being duly convicted thereof, incur and suffer the penalties ordained and provided by the Statute of Provision and Praemunire made in the sixteenth year of the reign of Richard the Second'.[17]

In its enthusiasm to outlaw such a marriage and all the parties to it, the legislature would seem to have overreached itself, in that, since everyone present at the ceremony is guilty of a crime, evidence of its having taken place could only come from a police spy provided in advance with a free pardon. No one can be compelled to

[13] *The Complete Peerage*, III, 547, note (*a*).

[14] *Supra*, note (6).

[15] Thus the Archduke Franz Ferdinand of Austria-Este (murdered at Sarajevo in 1914), had married without permission a member of the Bohemian *noblesse*. Consequently, his sons, though legitimate, did not succeed to the Dual Crowns in 1916. (*Almanach de Gotha*, 1932 ed., 488.)

[16] *I.e.*, the procedure under section 2.

[17] 16 Ric. II, c. 5 (1392–3). They were the forfeiture of all the property, real and personal, of the person convicted, and his imprisonment for life or perpetual outlawry. The forfeiture is an express part of the sentence, and the crime not being a felony, it was not abolished by the Forfeiture Act, 1870. (Kenny, *Outlines of Criminal Law*, 15th ed., 323.) Criminal outlawry was abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 12. The imprisonment is untouched by the Criminal Justice Act, 1948, 10th Schedule.

give evidence which will have the effect of incriminating the witness himself.[18] Consequently, although a number of criminal ceremonies have taken place,[19] no prosecution has ever been instituted so far as can be traced, for the crime created by this section 3.[20] Of course, public opinion would not have countenanced such a proceeding in recent times.

But the purpose of this article is not to criticise the provisions of the Royal Marriages Act as they stand, but rather to inquire whether there is now in fact any living person to whom the Act applies.

I refer once more to the exemption given by section 1[21] to ' the issue of princesses who have married, or may hereafter marry, into foreign families '. Counsel for the petitioner in the *Sussex Peerage Case*, Sir T. Wilde,[22] puts the position thus, ' The Act itself excepts from its operation the issue of princesses, who have been married, or who may marry into foreign families. This shows that it was intended to have a very restricted operation, and not to apply to all those who, by the chance of events, might come to have a claim to the succession to the Crown. If the Act really had any distinctive purpose of policy, here is an abandonment of it. The persons nearest to the succession to the Crown, have been those expressly excepted from its provisions. The Princess Charlotte[23] was a princess who married into a foreign family. By the terms of the Act, her issue would be excepted from its provisions; yet she was very near the throne; and her case, therefore, affords a proof of the extraordinary inaccuracy and looseness with which the Act was drawn, and shows it rather to have been an emanation from the Royal temper at the moment, than a well-considered and well-framed piece of legislation. The issue of her present Majesty,[24] had she married while a princess, would in like manner have been exempt from its operation '.

This argument was only incidentally relevant in the *Sussex Case*. Consequently, it was not dealt with in the judgments. At other stages in the argument numerous judicial interjections took

[18] *R.* v. *Slaney* (1832) 5 C. & P. 213; *R.* v. *Garbett* (1847) Den. 236. Moreover, it is unusual to convict on the uncorroborated evidence of accomplices, which everyone present must necessarily be.

[19] *E.g.*, those referred to in note (11) *supra*. The second Duke of Cambridge (1819–1904), the famous Commander-in-Chief, is believed to have been the most recent case, but as to his marriage, see note (72) *infra*.

[20] Nullity proceedings were taken in respect of the Duke of Sussex's first ' marriage '. (Foster's *Peerage*, 1880, lxxvii.) See also the Duke's declaration, *Sussex Peerage Case*, at p. 99.

[21] *Supra*.

[22] At p. 93.

[23] Only child of George IV, born in 1796. Her husband was Prince Leopold of Saxe-Coburg-Saalfeld (1790–1865), afterwards first King of the Belgians. (Queen Victoria's ' Uncle Leopold '. Also Prince Albert's.) She died in childbirth in 1817 without surviving issue. If the writer's later contention as to the meaning of issue (*infra*) be correct, this Princess was herself exempt from the Act, her maternal grandmother being Augusta, Duchess of Brunswick-Wolfenbüttel, eldest sister of George III.

[24] Queen Victoria.

place, which tends to show that their lordships were not violently in disagreement with the gist of it, *i.e.*, that Princess Charlotte and Queen Victoria (had she been a princess) would be treated as having married 'into foreign families'. Both of their husbands were princes of the house of Saxe-Coburg—clearly a foreign family. It is to be noted that the words used are 'marry into foreign families', and not 'marry foreign subjects'. In point of fact both princes had been naturalised by Act of Parliament before their respective marriages.[25] It is the foreignness of the family, not that of the individual member of it, which is in question.

If this contention of Sir T. Wilde is correct, the Royal Marriages Act can have no application to the issue of the Princess Elizabeth, Duchess of Edinburgh, as she has married into a foreign family, that of Greece.[26] Although her husband uses the surname of Mountbatten,[27] and is a naturalised British subject,[28] he was born a Prince of Greece, a Greek subject, the son and grandson of Greeks. The contention might however be attacked on the ground that naturalisation cuts the individual off from his family. In Roman law a *capitis deminutio media*—loss or change of civil status[29]—took the *deminutus* out of the *potestas* of his *paterfamilias*.[30] But if words are given their ordinary meaning, the word 'family' appears to extend to a man's near blood relatives without regard to nationality. The context, 'marry into . . . families', shows that it does not here mean 'children', as in the phrase, 'my wife and family'. As Wickens V.-C. said in *Burt* v. *Hellyar*,[31] 'family', 'is a popular and not a technical expression', and 'is, in itself, a word of the most loose and flexible description'.[32] It may be argued that it should therefore be given the meaning which will best give effect to the declared object of the statute, *viz.*, to safeguard certain Royal marriages. Against this must be put the fact that this is a penal statute establishing a crime (which is not *malum in se*) and one 'passed to deprive certain persons of a natural right, a right sanctioned and enforced by the law of both God and man'.[33] Such an Act must be construed very strictly and any exemptive clause as liberally as possible.[34]

[25] Prince Leopold by 56 Geo. III, c. 12; Prince Albert by 3 Vict. c. 2.

[26] The Royal family of Greece is a cadet branch of that of Denmark. Its correct designation is 'the house of Slesvig-Holstein-Sonderburg-Glucksburg'. (So used to fill the column 'father's surname' in Prince Philip's marriage register, reproduced in Shew, *Royal Wedding*, at p. 117.)

[27] Assumed on his naturalisation, February, 1947. (Shew, *op. cit.* 72.) His mother was a Princess of Battenberg.

[28] By ordinary process, not special Act.

[29] *Capitis deminutio media* occurred when a Roman citizen became *civis* of another town, *e.g.*, a *civitas peregrina* or a Latin colony, between which and Rome there was no complete community of civil rights (see Moyle's note to Inst.1.16.ii, citing Cicero).

[30] Inst.1.12.i.

[31] L.R. 14 Eq. 160, at p. 164.

[32] *Per* Kindersley V.-C. in *Green* v. *Marsden* (1853) 1 Drew 646, 651.

[33] Erle C.J. (as counsel), *Sussex Peerage Case*, at p. 135.

[34] I return to this matter, *infra*; notes (49) and (50).

The restriction of the exemption to the issue of princesses is very curious. Assuming for the moment that Queen Victoria is disqualified, as Sir T. Wilde suggests,[35] there is a purely fortuitous distinction between the issue of an heiress presumptive, who marries (with permission) into a foreign family before her accession, and that of one who, being refused permission, has to wait until her accession takes her out of the statute.[36] But was Queen Victoria not a princess?[37] A peerage merges in the Crown, when its holder succeeds to the fountain of honour, and is extinguished,[38] but the purely titular dignity of princess is not a peerage.[39] The greater is often included in the less.[40] The fact that King Edward VIII was styled 'Prince Edward' from the moment of his abdication without further grant[41] appears to indicate that he remained a Prince throughout his tenure of the Crown. In the formal language of royal proclamations the Sovereign is often styled 'Prince' or 'Princess'. Thus the proclamation of his present Majesty's accession ended with these traditional words, 'beseeching God, by whom kings and queens do reign, to bless the Royal Prince, George the Sixth with long and happy years to reign over us'.[42] In old statutes this usage is frequent, *e.g.*, the Recognition Act, 1603, refers to 'the highe and mightie Princesse of famous memorie, Elizabeth, late Queen of England'.[43]

The restriction appears to have another curious effect. If the Sovereign's only daughter and heiress married into a foreign family, her issue would be exempt albeit in direct proximity to the throne; but if a daughter of, say, the present Earl of Harewood were to marry a man of her mother's nationality, her issue would remain subject to the Act.[44] And it might obviously be someone much more remote from the succession than that.

But the main contention of this article rests neither on the phrase 'into foreign families' nor on the technical definition of a princess.[45] It is suggested that in fact all the descendants

[35] *Supra.*
[36] See note (2) *supra.*
[37] She clearly remained throughout her life a Princess of Hanover, but I apprehend that the princess must be a British one.
[38] *Lord Cranmore's Case* (1848) 2 H.L.C. 910. *Buckhurst Peerage Case* (1876) 2 A.C. 1, *per* Lord Cairns L.C., at p. 28.
[39] It was held in the *Wensleydale Peerage Case* (1856) 5 H.L.C. 958 that the Crown cannot create a peerage unless it be hereditary. A prince has to be created a peer before entering the House of Lords.
[40] *E.g.*, a bequest of the testator's one-third share in a partnership may pass the whole business, acquired before his death (*Re Russell* (1882) 19 Ch.D. 432).
[41] White, *The Abdication of Edward VIII* (1937).
[42] *London Gazette*, December 12, 1936.
[43] 1 Jac. 1, c. 1 (preamble); 4 Halsbury's Statutes, 126.
[44] Because she would not be a princess. This example assumes that the Earl is within the Act, which, it is contended, he is not.
[45] By Royal Warrant of December 11, 1917, 'the children of any sovereign of the United Kingdom and the children of the sons of any such sovereign and eldest living son of the eldest son of the Prince of Wales, shall have and at all times hold and enjoy the style, title or attribute of Royal Highness with

of King Edward VII are as a result of cross-marriages the issue of an undoubted princess who married into an indisputably foreign family. Queen Alexandra was fourth in descent from Princess Louisa (1724–1751), who married King Frederick VII of Denmark. She was George II's youngest daughter.[46] The late King George V's descendants, who are the only members of the Royal family reasonably near to the succession, are doubly exempted, as Queen Mary's mother, Princess Mary of Cambridge (1838–1897), married into the foreign family of Teck.[47] It is therefore submitted with very great respect that the whole of the issue of Edward VII are within the exemptive provisions of section 1 of the Royal Marriages Act, 1772.

This contention is based on the assumption that the words 'the issue' of such a princess mean 'all the issue'. It is difficult to see what other meaning can be put upon these words. It would be quite arbitrary to add some such phrase as, 'not being British subjects', or, 'not being more directly descended from a later British Sovereign'.[48] These phrases of limitation simply are not there. No doubt the legislature would have done better to add them, but it having failed to do so, it is no part of a judge's duty in construing what has been enacted to add to it what should have been enacted. As has already been pointed out, this is a penal statute and must be strictly construed.[49] Any exemptive provisions, on the other hand, must be construed as favourably as possible.[50] If a descendant of Edward VII[51] were on trial for the crime created by the statute,[52] he would be entitled to claim that he was the issue, albeit somewhat remote,[53] of a princess who married into a foreign family, and therefore entitled to an acquittal.

their titular dignity of Prince and Princess prefixed to their respective Christian names, or with their title of honour'. Previously the titles had been more extended. It is suggested that a reigning queen would normally come within these words, as Queen Victoria clearly did.

46 Her daughter Louise, Princess Charles of Hesse-Cassel (1750–1831), had a daughter, also Louise, the Duchess of Slesvig-Holstein-Glucksburg (1789–1867), who was the mother of King Christian IX of Denmark (1818–1906), Queen Alexandra's father. Queen Alexandra's mother was also a descendant of George II.

47 A morganatic branch of the royal house of Wurtemberg. Her husband, Francis, first Duke of Teck (1837–1900), resided in England after his marriage in 1866, but does not appear to have been naturalised.

48 It is extremely difficult to frame words which catch those persons whom it is necessary to catch and no others.

49 *Kent* v. *Whitby* (1738) 3 Brown's Parl.Cas. 187; *London Passenger Transport Board* v. *Moscrop* [1942] A.C. 332 at p. 342; *Adrema, Ltd.* v. *Jenkinson* [1945] K.B. 446 at p. 452.

50 *Hutchinson* v. *Manchester, Bury and Rossendale Ry.* (1846) 15 M. & W. 314, at p. 318.

51 Other than the Duke of Windsor and his issue. They are expressly exempt by His Majesty's Declaration of Abdication Act, 1936 (1 Edw. VIII & 1 Geo. VI, c. 3), s. 3.

52 Section 3.

53 Necessarily not so remote as their descent from George II, which gives the court jurisdiction.

From the wording of the Act[52] it is clear that the tests of criminality and nullity are the same.

In the *Sussex Peerage Case* itself,[54] Tindal C.J. said, 'If the words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The words themselves alone do, in such cases, best declare the intention of the law giver'. Later[55] he says of the particular act in question, 'the words of the statute appear to us[56] to be free from ambiguity'. The natural and ordinary meaning of the term 'issue' is descendants *ad infinitum*.[57] In other statutes relating to the Royal family the word is invariably used in this sense.[58] In some will cases a so-called 'popular' meaning has been given to the words restricting them to issue in the first generation, *i.e.*, children.[59] Such a construction here, as well as being quite unjustifiable, since the legislature must be taken to understand the ordinary legal meaning of a word, would lead to absurd and untenable results. For example, while the children of Empress Victoria of Germany[60] would be exempt, her grandchildren and their descendants, necessarily more remote from the British crown, would have to have their marriages approved by the Kings of England. If then 'the issue' is given its ordinary meaning, the only possible meaning which it can be given in this context, it must necessarily follow that all the descendants of Edward VII are within the exempting words.

It may even be asked whether there is now any living person to whom the Act applies. Even if Queen Victoria was not a 'princess' within the meaning of the Act, or her marriage was not one into a foreign family—which are admittedly matters of argument—most, if not all, of her living descendants can claim exemption by some other line of descent. Thus all her daughters who had issue married

[54] *Loc. cit.*, at p. 143.
[55] *Idem.*
[56] The question had been referred to the judges.
[57] *Whythe* v. *Thurlston* (1749) Amb. 555; S.C., *sub nom. Wyth* v. *Blackman*, 1 Ves.Sen. 196; *Davenport* v. *Hanbury* (1796) 3 Ves.Jun. 257, *per* Arden M.R. at p. 258; *Hockley* v. *Mawbey* (1790) 1 Ves. 143, 150; *Freeman* v. *Parsley* (1797) 3 Ves. 421; *Leigh* v. *Norbury* (1807) 13 Ves.Jun. 340, 344; *Bernard* v. *Mountague* (1816) 1 Mer. 422, 434; *Head* v. *Randall* (1843) 2 Y. & C. Ch.Cas. 231, 235; *Hall* v. *Nalder* (1852) 22 L.J.Ch. 242; *Ross* v. *Ross* (1855) 20 Beav. 645, 648; *Rhodes* v. *Rhodes* (1859) 27 Beav. 413, 416; *Re Corlass* (1875) 1 Ch.D. 460; *Edyvean* v. *Archer*, *Re Brooke* [1903] A.C. 379, 384; *Re Burnham*, *Carrick* v. *Carrick* [1918] 2 Ch. 196; *Re Sutcliffe*, *Alison* v. *Alison* [1934] Ch. 219.
[58] *E.g.*, The Act of Settlement, 1700 (12 & 13 Will. III, c. 2), s. 1: 'in default of issue of the said Princess Ann and of His Majesty'. For an exactly similar use, see the Succession to the Throne Act, 1544 (35 Hen. VIII, c. 1), s. 1, 'and for default of such issue . . .'.
[59] *Ralph* v. *Carrick* (1879) 11 Ch.D. 873, *per* James L.J. at p. 883. If it is qualified as, *e.g.*, 'issue male' or, 'eldest issue male', it may in a will be read as equivalent to 'heir-at-law' of the appropriate kind. (*Re Cosby's Estate* [1922] 1 Ir.R. 120.) Such a reading here would lead to even more absurd results than that as 'children' referred to in the text.
[60] Eldest daughter of Queen Victoria, see *infra*, note (61).

into foreign families.[61] Her second son, the Duke of Edinburgh (1844–1900)[62] is represented only by the issue of his four daughters, all of whom married into foreign families.[63] The youngest son, the first Duke of Albany (1853–1884) married a descendant of Augusta, Duchess of Brunswick-Wolfenbüttel (1737–1813), eldest sister of George III.[64] More difficult is the case of the third son, the first Duke of Connaught and Strathearn (1850–1942). His wife was descended from the only daughter of George I, but apparently[65] not from George II. This raises the point whether the exempting princess must herself be a descendant of George II.[66] If so, this branch of the Royal family is the only one to whom the Act may possibly apply. But his elder daughter married into the Royal house of Sweden, so as to exempt her issue.[67] Therefore the sole person to whom the Act could apply would seem to be the only son of the other daughter, Lady Patricia Ramsey.[68] He is Captain Alexander Ramsey (born 1919), approximately sixty-eighth in the line of possible succession to the throne.[69] This seems a sufficient commentary on the supposed effectiveness of the Royal Marriages Act in protecting the throne from undesirable consorts. But, of course, if the arguments for Queen Victoria's

[61] The Princess Royal Victoria (1840–1901) married the German Emperor Frederick, Princess Alice (1843–1878) the Grand Duke Ludvig IV of Hesse, Princess Helena (1846–1923) Prince Christian of Slesvig-Holstein; Princess Louise (1848–1939) married the ninth Duke of Argyll, but had no issue; Princess Beatrice (1857–1944) married Prince Henry of Battenberg. The last-named was naturalised, but only after his marriage. (*Dictionary of National Biography*, Supp. II, 411.)

[62] Reigning Duke of Saxe-Coburg and Gotha from 1893.

[63] Princess Marie (1875–1938) married King Ferdinand of Rumania, Princess Victoria (1876–1936) the Grand Duke Cyril Vladimirovitch, head of the House of Romanov after the annihilation of the Tsar's immediate family, 1918, Princess Alexandra (1878–1942) into the mediatised German family of Hohenlohe-Langenburg, Princess Beatrice (born 1884) the Infante Alfonso of Orleans-Bourbon. The Duke's only son died without issue in 1899.

[64] As to this lady, see also note 22, *supra*. The Duchess of Albany was daughter of Helena, Princess George of Waldeck (1831–1888), daughter of Paulina, Duchess of Nassau (1810–1856), daughter of Prince Paul of Wurtemberg (1785–1852), son of Queen Charlotte of Wurtemberg (1764–1788), daughter of the Princess Augusta referred to in the text.

[65] In view of the complexities of royal genealogies, it is dangerous to state a negative categorically. The Duchess of Connaught was daughter of Prince Friedrich Karl of Prussia (1828–1885), the famous 'Red Prince' of the Franco-Prussian war. George I's daughter was Queen Sophia Dorothea of Prussia (1685–1757), who can scarcely be called an English Princess at all, but is within s. 1 of the Act of Settlement, 1700.

[66] Presumably she must. Otherwise a Stuart or even a Plantagenet princess might be used.

[67] Princess Margaret of Connaught (1882–1920) was the first wife of the present King of Sweden.

[68] Born 1885. Also to her for a re-marriage. The Duke's male issue became extinct at the death of his grandson, the second Duke (1914–1943).

[69] This is a conservative estimate. Between him and the throne, stand, in addition to all the descendants of George V (except the Duke of Windsor), members of the Royal families of Norway, Rumania, Greece, Yugoslavia, Romanov, Leiningen, Hohenzollern, Hohenlohe-Langenburg, Slesvig-Holstein, Sweden and Denmark; also Hapsburg and Orleans-Bourbon, if prepared to forswear their religion.

being an exempting princess [70] are accepted, even Captain Ramsey must be outside the Act.

There is, however, one other group of descendants of George II—the German house of Hanover or Brunswick-Luneburg. As their descent is directly through males, they would seem to be particularly within the intention of the statute. But King George V of Hanover (1819–1878)[71] married a descendant of the Princess Royal Anne, Princess of Orange-Nassau (1709–1759), eldest daughter of George II. From this marriage the present Hanoverian line descends. Thus there is, as far as can be ascertained from published genealogies, only one living unmarried descendant of George II to whom the Act may still apply.[72]

This marriage of George V of Hanover makes the question of whether the Act can apply to persons who are not British subjects a purely academic one. It was never anything else (except possibly as regards papists) as by the remarkable Princess Sophia Naturalisation Act, 1705, every protestant descendant of that lady was—at least for the purposes of English law—a British subject.[73] But in any event domicile and not nationality is the test by which the capacity of a person to marry must be tested.[74] It is at least arguable that the terms of the Royal Marriages Act are so categoric that even a foreign-domiciled person—if he is not within the exemptive words—must be treated by the English courts as being incapable of matrimony without the British King's consent.[75]

[70] *Supra.*

[71] Second Duke of Cumberland and Teviotdale, a grandson of George III. Queen Mary of Hanover's mother was Amelia, Duchess of Saxe-Altenburg (1799–1848), whose mother, Henrietta, Duchess Ludwig of Wurtemberg (1780–1857), was the youngest daughter of the Princess Royal Anne referred to in the text. The heads of the House of Hanover in the next two generations also married the foreign issue of British princesses. They and the second Duke of Albany (reigning Duke of Saxe-Coburg-Gotha from 1900) were deprived of their British honours under the Titles Deprivation Act, 1917 (6 & 7 Geo. V, c. 47), but this has affected neither their eventual right of succession to the throne nor the incapacity (if any) they might have under the Royal Marriages Act.

[72] The most striking result of the writer's contention, if it be correct, is that the second Duke of Cambridge (*supra*, note (19)) could lawfully have married his 'wife', Mrs. Fitzgeorge. His mother was Princess Augusta of Hesse-Cassel (1797–1889), grand-daughter of Princess Mary, Landgravine of Hesse-Cassel (1723–1771), fourth daughter of George II. He and his sisters and Princess Charlotte of Wales (*supra*, note (23)) were the only grand-children of George III exempt on the writer's contention. He went through a form of marriage in church (*The Complete Peerage* II, 499, note (*c*), but it is unlikely that the marriage was formally correct, as it seems improbable that banns were read or a licence obtained, in view of the substantial 'cause or impediment' then thought to exist.

[73] 4 & 5 Anne, c. 15; 4 Halsbury's Statutes, 165. (It was repealed by the British Nationality Act, 1948 (4th Schedule).)

[74] *Re Bozzelli's Settlement* [1902] 1 Ch. 751, *per* Swinfen Eady J. at p. 753. Dicey, *The Conflict of Laws* (6th ed.), Rule 168, p. 758; see also Exception 1, p. 777 and note (47), p. 778.

[75] The Act seems to contemplate this. Otherwise there would be no need expressly to exempt the issue of princesses, whose issue would normally be domiciled abroad.

To sum up, the Royal Marriages Act, 1772, has spent its force, every now living descendant of George II[76] being exempted as 'the issue of princesses who have married . . . into foreign families'.[77] This is scarcely to be regretted, as few Acts have been so badly drafted or excited so much execration. Even when there were descendants to whom it did apply, it did not do its work properly. Thus a Roman Catholic descendant—with no possible interest in the succession[78]—was caught by its terms,[79] but the heir presumptive to the throne, if only his mother had married into a foreign family, was exempt. In fact, 'marriages' rendered criminal and void by its provisions were treated socially as the equivalent of the continental morganatic marriage.[80]

If it be true that 'marriages in the Royal family are of the highest importance to the state'[81] it is obviously desirable that new legislation should be introduced. There seems little need to make it extend beyond the descendants of the late King George V. No criminal penalty should be attached, it is suggested, to a marriage of such a descendant without the Royal consent; nor should the marriage be rendered void. A solution more in accordance with modern ways of thought would be that the descendant by such marriage should forfeit all title to the throne for himself and his issue.[82] Extreme care would be necessary in drafting the section (if any) conferring exemption upon the issue of those female members of the Royal house who marry into foreign families.

C. d'O. FARRAN.*

[76] With the possible exception of Captain Ramsey, *supra*.

[77] Section 1, *supra*.

[78] Act of Settlement, 1700, s. 1.

[79] There are no words excluding them from the Royal Marriages Act. But for this Act George IV's marriage to Mrs. Fitzherbert (note (11), *supra*) would have incapacitated him for the Crown and probably the Regency, as she was a Roman Catholic.

[80] Thus, the Duke of Sussex's first English 'marriage' took place publicly at St. George's, Hanover Square, and Queen Victoria created his second 'wife' Duchess of Inverness. (*The Complete Peerage*, VII, 69). The Duke of Cambridge was attended by his illegitimate sons even on State occasions. (Bodley, *The Coronation of Edward the Seventh* (1903) 342.) It is commonly stated (*e.g.*, *The Complete Peerage*, II, 499, note (*c*)) that these 'marriages' were ecclesiastically binding. The language of annulment (s. 1) is, however, irreconcilable with this view. By s. 7 of the Act for the Submission of the Clergy, 1536 (28 Hen. VIII, c. 19; 7 Halsbury's Statutes, 31) canon law is not valid when in contradiction to the express words of a statute.

[81] Preamble to the Royal Marriages Act, *supra*. The events of 1936 clearly demonstrate that they are.

[82] This is the position in Scandinavia. In Sweden all princely titles are usually forfeited, the Prince simply becoming 'Hr. Bernadotte'. This seems unduly drastic. In Denmark the Prince's wife is styled 'Princess', but neither she nor her husband is a 'Royal Highness'. (See the *Almanach de Gotha*, sub. tit. 'Danemark' and 'Suède'.) The Duchess of Windsor is not entitled to this style (*London Gazette*, May 27, 1937).

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# NOTES OF CASES

## Treaties before Municipal Courts

In breach of obligations which the United Kingdom assumed by a treaty with Italy and which, in effect, provided for the release to the order of the Italian Government of all assets belonging to Italian nationals, the Board of Trade released the property of the late King of Italy to the administrators of his English estate. When the Republic of Italy instituted proceedings to recover the property, its action was dismissed on the paramount ground that the treaty had not been so incorporated into the law of England as to enable the court to hold that the release ordered by the Board of Trade was unlawful: *The Republic of Italy* v. *Hambros Bank* [1950] Ch. 314. In reaching this result Vaisey J. confessed to 'some bewilderment' and in vain searched for 'some explanation of what is to me inexplicable' (p. 329). From the point of view of public international law the result is indeed a stain on English law, however inevitable it may have been in the present state of the authorities, for a treaty has been allowed to be displaced by English municipal law. Would it not have been possible and perhaps necessary to uphold the treaty by resorting to the doctrine of public policy? Do not the highest interests of State require refusal of recognition to such acts of the government as are plainly inconsistent with the treaty obligations solemnly undertaken by the government on behalf of the Crown? Undoubtedly, 'wherever sovereign nations have contracted upon sovereign matters, the effect is a species of obligations *ex quo non oritur actio*": *Nabob of the Carnatic* v. *East India Co.* (1791) 1 Ves.Jr. 370, 389, 390, *per* Lord Thurlow, and many later authorities. But although no party to a treaty can invoke municipal jurisdiction for the purpose of enforcing its terms, this does not lead to the further rule that the breach of some principle of municipal law is required, and the breach of an international obligation is insufficient, to support a violation of public policy. Where it is the Executive that has broken the terms of a treaty, it is not too much to say that to sanction the breach is opposed to those standards of conduct and that rule of law which this country is striving to maintain. Even a private person who violates those standards of international conduct by contemplating action hostile to a friendly State will find his contract stigmatised as irreconcilable with public policy and, therefore, illegal: *De Wütz* v. *Hendricks* (1825) 2 Bing. 316. The standards applicable to the Executive should be more, not less, severe. Courts have been prone to derive legal maxims from the alleged necessity for conforming with the Executive's conduct of

foreign affairs (see 'Judiciary and Executive in Foreign Affairs' in *Transactions of the Grotius Society*, 1943, 143). The courts should be even more willing to make the Executive itself abide by the obligations contained in treaties and for this purpose, while not allowing the terms of a treaty to be enforced by action in a municipal court, to refuse sanction to a breach of a treaty. In 1888 Maitland said (*The Constitutional History of England*, p. 425): 'Suppose the Queen contracts with France that English iron or coal shall not be exported to France,—until a statute has been passed forbidding exportation, one may export and laugh at the treaty'. Even if this remains true today as a general proposition, the Executive ought not to be allowed so to laugh.

F. A. MANN.

## THE TIME OF PAYMENT OF CHEQUES

IF a debtor pays his creditor by means of a cheque it is trite law that in the absence of evidence to prove that the creditor took the cheque in satisfaction of the debt the implication is that the receipt of the cheque operates as a conditional payment (see *Byles on Bills*, 20th ed., 311): if the cheque is not paid at the due date the original debt revives, and can be enforced by action (*ibid.*, p. 312, and authorities cited). What had never been determined until *Re Hone* [1950] 2 All E. R. 716 was as to the precise point in time at which the creditor is to be regarded as having received the money; is it when he takes the cheque or when the cheque is paid? According to Harman J. in that case the latter is the correct view, at any rate for purposes of bankruptcy.

On the face of it the point appears to be an elementary one, and one of importance, and it seems strange that it should have gone so long undecided. On reflection however it is difficult to imagine cases where it would be likely to arise, apart of course from bankruptcy. Nevertheless it is clearly one of much interest, and it seems a pity that the learned judge should have dealt with it in a somewhat perfunctory manner, brushing aside in his judgment earlier opinions which if they did not decide the matter, at any rate, it is submitted, throw a good deal of light upon it. Nowhere in his judgment is any appreciation shown of the nature of a condition subsequent, nor in so far as the matter is to be determined on the basis of the provisions of the Bankruptcy Act, 1914, does he at any point have regard to what are the sort of considerations which should govern the protection of transactions from the operation of the bankruptcy law.

The facts of *Re Hone* shortly were that Mrs. Hone paid to the Kensington Borough Council a rate demand by means of a cheque. Shortly after the cheque had been paid into the Council's banking account, and before it had been collected Mrs. Hone was

made bankrupt. The cheque was a few days later collected by the Council's bank, and credited to their account. The trustee in bankruptcy claimed that the money was part of the bankrupt's estate, and must be refunded by the Council. The Council contended that the transaction was protected by section 45 of the Bankruptcy Act, 1914, since the payment had taken place before the date of the receiving order. The trustee in bankruptcy was held entitled to recover the money from the Council.

The first point to be decided seems to me to be whether the time at which payment takes place in these circumstances is to be determined as a matter of general law, or as a matter of the construction of section 45 of the Bankruptcy Act, 1945. Prima facie the latter should be the correct view but it is submitted that unless there are words in the section which take the point out of the ambit of the general law it is not only highly desirable but correct to follow the general rule. It is not quite clear whether the learned judge accepted this view, but since he refers to a number of cases which were not concerned with bankruptcy we may perhaps take it that he reached his conclusion on general grounds. At any rate it is submitted that the words 'payment . . . takes place' in the section are not such as to take the case out of the ordinary rule relating to payment by cheque, whatever that may be.

When then does 'payment take place' in the ordinary type of transaction where a cheque is used? Prima facie one would say that any agreement entered into, or act done subject to a condition subsequent is good and effective unless and until the condition happens. There are dicta to this effect in *Hadley (Felix) & Co.* v. *Hadley* [1898] 2 Ch. 680, *Marreco* v. *Richardson* [1908] 2 K.B. 584, and *Pearce* v. *Davis* (1834) 1 Mood. & R. 365. And this being so it is difficult to understand why payment should not be regarded as having taken place when the Council took the cheque. They could, of course, have refused a cheque and demanded legal tender, upon which presumably Mrs. Hone, whose arrangement with her bank would have permitted her to withdraw the necessary funds, would have paid in notes. But this would have been a highly unrealistic proceeding, and it is submitted that a judgment which in effect requires the creditor to demand legal tender, and refuse a cheque if he is to be safe is equally unrealistic.

The learned judge, however, brushing the above cited cases aside took the view that the Council 'got the money when it was the richer by £55', presumably meaning at the point when the cheque was passed through the Clearing House. But this, with respect, is a superficial, and again a somewhat unrealistic, view. The Council would be credited with the amount of the cheque very shortly after it was paid into their account, and would according to the ordinary practice of banking be allowed to draw upon it as from that time: in other words, they 'got the money' then. It is

true, of course, that had the cheque afterwards been dishonoured their account would in due course have been debited to that extent.

Again, how can it be said that the Council 'got the money' in any real sense when the cheque was collected? All that happened was that some further notes were made in a ledger: they certainly never received anything in cash, or other legal tender then, or at any other stage, and no one in the twentieth century would expect them to do so. All the stages in a transaction of this kind are in fact bookkeeping entries, and it seems common sense to treat the first of them, which in ninety-nine cases out of a hundred would be the operative one, as being in fact the receipt of payment.

Even if the matter be looked at purely from the policy of the Bankruptcy Act, 1914, the case in favour of the Council seems to be even stronger. That policy is that bona fide transactions which have gone through without notice of the bankruptcy shall not be opened up provided they have taken place before the receiving order. In the conditions of modern business where most payments of substantial sums are made by cheque it seems only realistic to regard the giving and receiving of a cheque as a transaction eminently worthy of such protection, the more so as so soon as the payee has got it into his bank he will in fact be in a position to draw upon it. It seems obvious that his protection cannot be allowed to depend on the chance of whether he drew upon it in fact, and yet if he has done so it seems particularly inequitable to hold that he is not protected against the trustee in bankruptcy. It is submitted therefore that both in law, equity, and under the Bankruptcy Act the only proper and realistic date to take for payment when made by cheque is that at which the cheque is tendered by the debtor, and accepted as provisional payment by the creditor.

C.

## COMMITTAL FOR SENTENCE

THE number and difficulty of the Statutes and Regulations which have to be administered by magistrates in petty sessions are, as the Roche Committee pointed out in its report in 1944 (Cmd. 6507), such that justices and their clerks are faced with increasingly complex problems of procedure. The Criminal Justice Act, 1948, has not lightened their burden. A case in point is *R.* v. *South Greenhoe Justices, Ex p. Director of Public Prosecutions* [1950] 2 All E.R. 42, where, after an initial mistake in the interpretation of sections 28 and 29 of the Act, the respondent, though convicted of a number of criminal offences, almost knocked at the prison gates in vain. It was only upon a motion for mandamus that the King's Bench Division was able to cut the Gordian knot and to make sure that the offender should be not only convicted but also sentenced.

For some time past difficulties have arisen when magistrates, exercising their alternative statutory jurisdiction for certain specified offences, reach the opinion, after they have entered into the substance of the case at hand, that the maximum penalty which they can impose by law is inadequate to the offence to be dealt with and that it would have been better if they had committed the offender for trial at quarter sessions. These difficulties were blatantly shown up in 1936 in *R.* v. *Sheridan* [1936] 2 All E.R. 883 and *R.* v. *Grant* [1936] 2 All E.R. 1156 and there is no doubt that the new and elaborate provisions in sections 28 and 29 of the Criminal Justice Act, 1948, were drafted to overcome them. Unfortunately it would appear from the report of *R.* v. *S. Greenhoe JJ.* that even now the aim of giving clear guidance to magistrates may not have been fully achieved.

The decision whether to try summarily or to commit for trial to sessions imposes itself upon courts of summary jurisdiction when they stand seized of two categories of offences:—

(I) those specified in Schedule II of the Criminal Justice Act, 1925, because under section 24 of that Act a person charged with such an offence may be dealt with summarily provided he consents and the court considers this course expedient; and

(II) all other offences which by statute, such as the Bankruptcy Act, 1914, the Merchandise Marks Act, 1887, and many others may be proceeded against either summarily or upon indictment.

Although, according to *Hastings and Folkestone Glassworks* v. *Kalson* [1948] 2 All E.R. 1013, offences in both categories may be regarded as 'indictable offences', the distinction is still of practical importance and should be borne in mind because it is vital to subsequent discussion.

As a basic principle it is clear that all cases of a serious nature should be sent for trial at quarter sessions. Unfortunately it is not always simple for magistrates to say from the outset whether or not a given case is in fact suitable for summary trial, and during the hearing new considerations may crop up which alter the whole aspect of the case as a minor matter. The revelation, above all, that the person charged is of bad antecedents or character is a most important point which must clearly influence the view which the magistrates take of the seriousness of the offence before them and of the adequacy of the sentence which they can impose, but this information tends to become available too late, as was shown with disastrous consequences in *Sheridan* and *Grant*. In the former case, indeed, Humphreys J., delivering the judgment of the Court of Criminal Appeal, made (at p. 886) the suggestion that justices should, as a *preliminary* to dealing summarily with an indictable offence, hear and take into consideration the character and antecedents of the accused and that such a course would not involve

any unfairness to the accused, because ' presumably, if the character and antecedents of the accused as stated to them appeared to be bad, the justices would refuse to deal with the case summarily '. For this obiter dictum the learned judge appears to have had the support of the original wording of section 24 of the 1925 Act (now expressly amended by the cancellation of the words ' character and antecedents of the accused ': Criminal Justice Act, 1948, Schedule IX), but the suggestion, involving as it does complete disregard of what is generally considered a basic principle of our law of evidence, does not appear to have commended itself either to the majority of magistrates' courts or even to the legislature. Instead, courts of summary jurisdiction have abided rather by the spirit of an earlier dictum of Avory J. in *R.* v. *Hertfordshire JJ.* [1911] 1 K.B. 612 who, after quoting the corresponding provisions of the Summary Jurisdiction Act, 1879, that justices were to have regard, inter alia, ' to the character and antecedents of the person charged ', explained at pp. 623–4:—

> ' It would obviously be most improper for the justices to inquire into the character and antecedents of the person charged until, after having heard all the evidence they have determined to convict him; if they did so and then proceeded to convict, he could come to this court and get the conviction quashed on the ground that the justices had wrongly admitted evidence as to character before conviction.'

In *R.* v. *Sheridan* and *R.* v. *Grant* the prisoners had to be discharged because in both cases the court of summary jurisdiction concerned had changed its mind after conviction, when it discovered that the offenders in question had been previously convicted. In these circumstances, committal to quarter sessions for trial inevitably met with a successful plea of *autrefois convict*. Section 29 of the 1948 Act has now removed this stumbling block by giving magistrates express power to commit to quarter sessions for sentence after they have convicted the offender. This power is subject to certain conditions, the essentials of which were foreshadowed already in 1936 by Humphreys J. in *R.* v. *Grant* at p. 1158:—

> ' There really is no great difficulty. If the courts of summary jurisdiction will remember, where the offence is one primarily an indictable offence, it is their duty to proceed with the case as an indictable one, that is, to take depositions, and if in the course of taking these depositions or even before the depositions are taken the magistrates are satisfied, having regard to the matters to which they are directed by s. 24 (1), that the case is one proper to be dealt with summarily from their point of view, the court may then decide to deal summarily with the case, always assuming that the accused desires it so to do.'

Observance of this procedure appears now to be essential if the court of summary jurisdiction wishes, in any given case, to retain

the power to commit for sentence to quarter sessions, for section 28 (2) of the 1948 Act provides:—

> 'Where the court has begun, in accordance with the last foregoing subsection, to hear a case as if the offence were punishable on conviction on indictment only, then if at any time it appears to the court, having regard to any representations made in the presence of the accused by or on behalf of the prosecutor, or made by or on behalf of the accused, and to the nature of the case, that it is proper to do so, the court may then determine (subject to the following provisions of this section) to try the case summarily. . . .'

The slight, but significant, change from 'where the offence is one primarily an indictable offence' [*sic*] to '*as if* the offence were punishable on conviction on indictment only', the general heading covering the new sections 28 and 29: 'Offences punishable on summary conviction or on indictment', and above all the opening words of section 29 would seem to indicate that the newly created power to commit for sentence was intended to be available to magistrates' courts not only when dealing with offences under Schedule II of the 1925 Act (Category I above), but in all cases where it is incumbent upon them to decide whether to try summarily or to commit for trial (*i.e.*, including Category II above).

Indeed, the actual decision of the Divisional Court in *R.* v. *South Greenhoe JJ.* does not stand in the way of this interpretation, because on the facts the justices had there deprived themselves of the power to commit for sentence by entering upon the case from the outset, at the application of the prosecution, as a summary matter as they were free to do under section 28 (1), instead of observing the procedure prescribed by section 28 (2) which instructs them to begin to hear the case 'as if it were punishable on indictment only'. Quarter sessions were therefore undoubtedly right in saying that under the new Act they could not deal with the matter.

Surprisingly, however, according to Lord Goddard's account in his judgment of the King's Bench Division, they did so not on the ground that the magistrates had failed to observe the procedure laid down by the Act, but because, I quote, '*the offence* was one covered by section 28 (1) and not by section 28 (2)'. (Italics mine.) This view appears unfortunately to have remained unchallenged, if it was not indeed accepted by the Lord Chief Justice himself who (at p. 44) said that section 28 (1) which provides the new power to commit for sentence 'relates *only* to offences which are indictable and can only be dealt with summarily with the consent of the accused' (*i.e.*, Category I above).

This writer submits with respect that such a restriction of the new power of magistrates courts is not warranted by the wording of the Act and is highly undesirable. It is true that the difficulties in *Sheridan* and *Grant* which must have played their part in bringing about the provision of the 1948 Act arose out of offences

in Category I, but it is almost impossible to see how the situation of magistrates is any easier when they have to decide whether or not to commit for trial for an offence in Category II, without knowledge of the antecedents of the accused. Thus in *R.* v. *Greenhoe JJ.*, even if no application had at the outset been made for summary trial, the magistrates might, on the application of prosecution or defence, have determined at any later stage to try and to convict summarily. Subsequently, upon hearing of the accused's record they would have taken the view which they did in fact take, namely, that the sentence which they could give the accused was inadequate. Once again, if the Lord Chief Justice is right, there would have been no remedy.

Fortunately there is nothing in the new Act which imposes this view on the courts. Section 29 (1) allows committal for sentence where a person has been 'tried summarily by a court of summary jurisdiction for an indictable offence' *either* 'under section 28 (2) of this Act *or* section 24 of the Criminal Justice Act, 1925'. Section 28 (5) declares that the provisions of section 28 are not applicable to, inter alia, offences enumerated in Schedule II of the 1925 Act. But the converse is not true: there is nothing to indicate that offences not mentioned in this Schedule, that is those arising under statutes which provide that the offences there contained may be dealt with either summarily or upon indictment, are to be excluded from the operation of section 29. It is submitted that section 29 is in fact applicable to offences in Category I and II, both of which cover indictable offences within the meaning of the section, and that accordingly magistrates have power to commit for sentence in both cases.

If that be the correct view, a serious responsibility devolves upon those responsible for the prosecution not to make application for summary trial under section 28 (1) before the charge has been entered upon, unless the case, from all the information available to them, is clearly a minor matter. Once the magistrates court has determined from the outset to try the case under section 28 (1), power to commit for sentence is lost. Even if, however, the prosecution has made the application under section 28 (1), the court need not immediately adopt the suggestion; the section expressly states that the court '*may*' try summarily and whatever may have been the position before the section came into force, it is no longer true that the Bench has no option.

H. A. HAMMELMANN.

## JUDICIAL CONTROL OVER CONTROLLERS

IN *Liversidge* v. *Anderson* [1942] A.C. 206 the House of Lords held that reg. 18B of the Defence Regulations, which empowered the Secretary of State to make orders for the detention of persons

whom he had 'reasonable cause to believe' to be of hostile associations, meant simply that the Secretary of State had honestly to think that he had such reasonable cause. The long line of cases in which the courts have declined to review the exercise of other, but more widely drafted, discretionary powers led some writers to assert that the remarkable interpretation given to the word 'reasonable' in the context of reg. 18B might be extended to different contexts in time of peace. This view has in effect been scotched by the judgment of the Judicial Committee of the Privy Council in *Nakkuda Ali* v. *Jayaratne*, 66 T.L.R. 214, an appeal from Ceylon.

Under emergency legislation the Controller of Textiles was empowered to grant licences to textile dealers and to revoke a licence when he had 'reasonable grounds' for believing that its holder was unfit to continue as a dealer. The appellant, whose licence had been revoked, sought a mandate in the nature of a writ of certiorari to quash the revocation order, on the grounds that the Controller was exercising a quasi-judicial function and had cancelled the licence without having complied with the rules of natural justice. The Judicial Committee held (i) that under the relevant Ceylon legislation a mandate in the nature of certiorari would issue according to the same principles as English common-law certiorari, but (ii) that the Controller was under no duty to act 'judicially', so that (iii) certiorari could not issue and compliance with natural justice was unnecessary. The Supreme Court of Ceylon had accepted the appellant's contention that because the Controller could act only on 'reasonable grounds' his functions were partly judicial and not purely administrative. Lord Radcliffe, delivering the judgment of the Judicial Committee, agreed that the words 'reasonable grounds to believe' meant that 'there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation' (at 219). It would be 'a very unfortunate thing if the decision in *Liversidge's Case* came to be regarded as laying down any general rule as to the construction of such phrases . . .' (*ibid.*). *Liversidge* had merely established that the words 'reasonable cause to believe' were *capable* of being given a 'subjective' interpretation and that in the context of reg. 18B that interpretation was the right one. But although the 'objective' test was the one to be applied in the present case (and the Judicial Committee held that there were in fact reasonable grounds for the Controller's action) it did not follow that the Controller's functions were therefore judicial. 'Can one not act reasonably without acting judicially?' (*ibid.*). The relevant legislation did not require the Controller to hold any inquiry before he acted; hence if he voluntarily chose to hold an informal inquiry he was under no duty to obey the *audi alteram partem* principle. A further reason for holding that his functions were not judicial was that in cancelling a licence the Controller was

not 'determining a question' affecting the rights of subjects (cf. *R.* v. *Electricity Commissioners* [1924] 1 K.B. at 205), but was 'taking executive action to withdraw a privilege'.

The judgment is to be welcomed in so far as it puts *Liversidge* v. *Anderson* in its proper place; but one wishes that the opportunity had been taken to clarify (one hesitates to say 'rationalise') the law governing the relationship between certiorari, natural justice, and judicial and administrative functions. Two reasons were given why certiorari would not issue: the Controller was under no statutory duty to follow a procedure analogous to the judicial, and he was merely withdrawing a privilege. The second reason would not by itself have justified the decision, for decisions of licensing tribunals, which grant privileges, are in general amenable to certiorari and they must comply with the rules of natural justice. The decisive test applied by the Judicial Committee seems to have been procedural; the Controller was acting administratively because he was under no statutory duty to act like a tribunal. This emphasis on procedure as the test of a judicial function accords with most of the modern cases, and is of practical utility despite its vulnerability when closely analysed. But the procedural test has by no means always been regarded as decisive. Thus two important groups of cases go to show (a) that certiorari may issue to quash decisions affecting private rights although no 'judicial' procedure is prescribed and although no question of natural justice can arise (for modern cases, see *R.* v. *Minister of Health, Ex p. Doré* [1927] 1 K.B. 765; *R.* v. *Boycott* [1939] 2 K.B. 651), and (b) that absence of a statutory requirement of a hearing does not necessarily affect the common-law principle that private rights are not to be invaded without an adequate hearing (see cases from *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180, to *Urban Housing Co.* v. *Oxford C. C.* [1940] Ch. 70). It is perhaps possible to reconcile the present decision with these two groups of cases on the somewhat unconvincing ground that withdrawal of a privilege differs essentially from interference with a common-law right. If no licensing system had been in force, and the Controller had exercised a statutory power to close down a trader's business, would his action have been reviewable upon certiorari, and would he have been under a common-law duty to give the trader a fair hearing beforehand? So confused is the present case-law that one is inclined to seek the answer to this question in the writings of Jerome Frank.

S. A. DE SMITH.

## POWERS AND PURPOSES

SECTION 43 (1) of the Town and Country Planning Act, 1947, provides: The Central Land Board may, with the approval of the

Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development. Section 43 (2) empowers the Minister, if he is satisfied that it is expedient in the public interest that the C. L. Bd. should acquire any land for such purpose and that the C. L. Bd. are unable to acquire the land by agreement on reasonable terms, to authorise the C. L. Bd. to acquire the land compulsorily. Under the first part of subsection (1)—relating to performance of functions conferred by subsequent provisions—the C. L. Bd. would be able to exercise their compulsory powers to test market prices, to assist them in ascertaining development values, in fixing development charges and in collecting information for those purposes (sections 61, 70).

One of the purposes of the Act of 1947 is ' to secure the recovery for the benefit of the community of development charges in respect of certain new development ' (long title). The C. L. Bd. has the duty of determining what development charge shall be made and for this purpose the Minister, with the consent of the Treasury, may prescribe general principles (section 70 (3)). One such principle prescribed is that development charge shall be determined to ensure that land is bought and sold at its existing use value (SI 1948, No. 1189, Sched., para. 1).

In *Earl FitzWilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning and Another* [1950] 2 All E.R. 765, the applicants offered a plot of land, which they owned, to R, at a price which he contended was higher than its existing use value. R, therefore, requested the C. L. Bd. to use their compulsory powers for his benefit. The C. L. Bd. asked the applicants to adopt one of three methods of disposing of the land, all of which would, in effect, have meant that the land was sold at its existing use value, R paying any development charge. The applicants refused, whereupon the C. L. Bd. made a compulsory purchase order which recited the purpose contained in the second part of section 43 (1). The Minister confirmed the order which the applicants then challenged.

The following questions had to be answered. First, was the order made ' for the purpose of disposing of it for development ' within the meaning of the second part of section 43 (1)? The C. L. Bd. had cited this as their authority. Second, was the power to make an order for this purpose separate from the power to make orders for the purposes contained in the first part of that subsection? Birkett J. (as he then was) held that it was. Third, was the motive of the C. L. Bd., in making the order, to enforce compliance with their policy that land should be sold at existing

use value? Birkett J. held that it was 'difficult to resist the conclusion' that this was one of the 'purposes' but that it was not the sole consideration. Fourth, was one of the considerations which led to the making of the order the desire to punish the applicants for their refusal to adopt one of the three methods suggested by the C. L. Bd.? Birkett J. held that it was not.

'Purposes', 'motives', 'reasons', and 'considerations' are used somewhat indiscriminately throughout the argument and the judgment. There is, however, an important distinction between the first and the other three. A local authority may have power to purchase land for the purpose of widening streets. If it purchases land for some other purpose—for example, to resell at a profit—it is acting ultra vires (*Sydney Municipal Corporation* v. *Campbell* [1925] A.C. 338). But the local authority may act improperly in another way. It may purchase a particular plot of land in order to widen streets but with the principal motive of depriving the owner (whom it dislikes) of that land, knowing that he is anxious to keep it. In the present case, the applicants contended that the C. L. Bd. had not power to purchase the land because, they said, the purposes in the second part of section 43 (1) were subject to the purposes in the first part of that subsection. Birkett J. decided against them. They also contended 'that the order had been made in this case because the applicants refused to accept the board's policy . . . *viz.*, that land should not be sold at a price greater than its existing use value', and to punish the applicants. Birkett J. having refused to accept the 'punitive' contention, the 'existing use value' contention remained. It was not disputed that the C. L. Bd. made the order 'for the purpose of disposing of it for development' in the words of the Act. This, then, was a case unlike the *Sydney Case*. It was a case where the purpose was intra vires but where it was contended that the motive was improper.

The answer of the learned judge was that although that motive was improper, it was not the sole motive. He looked for other possible motives. He said, 'For example, and just for example, the board may have taken the view that section 43 gave them the power on the facts of this case to make the order in any event, and, if they were right in that view and they did possess the power, the precise motives with which they exercised it would not be material and would not be a matter for the court to inquire into, the good faith of the board and the Minister not being in question'. Alternatively, the C. L. Bd. might have thought they had the power to make orders to enforce sale at existing use value. But that this was the sole motive was precisely what the learned judge was at pains to deny. He said immediately before this statement that had this been the sole motive he would have held the order to be invalid. On what grounds could he do so if the motives were immaterial and not to be inquired into? As a third example of

what might have been the motive of the C. L. Bd., the learned judge mentioned the view of the Board, supported by the local authority, that approved development might be hindered, if not prevented, unless the land was made available. But it was this view of the C. L. Bd. that entitled them to claim that they had made this order ' for the purpose of disposing of it for development ' *i.e.*, that their *purposes* were intra vires. As I have said, the purpose may be valid while the motive is improper. The validity of the purpose does not exclude the possibility that the motive is improper.

All this is not to say that the proof of an improper motive should always invalidate an order. But it is to say that it should not be necessary to prove that the improper motive is the sole motive. The mind of the C. L. Bd. dwelt on matters which it ought not to have dwelt on. If these matters had prominence when the mind reached its decision then, it is suggested, the order should have been held ultra vires; if their importance and the part they appeared to play in the decision were insignificant then, it is suggested, the order should have been upheld. But to state, as Birkett J. stated, that if the power was there the ' precise motives ' were immaterial and not to be inquired into seems, with respect, to be a novel and somewhat dangerous principle. The doctrine of *Bradford Corporation* v. *Pickles* should not be extended to cover the statutory powers of public authorities.

J. A. G. Griffith.

## The Applicability of the Principles of Natural Justice to a Price Tribunal

Whether the principles of natural justice apply to the making of a Price Order by the Price Tribunal fell to be decided by the Supreme Court of New Zealand in *F. E. Jackson & Co., Ltd.* v. *Price Tribunal* (*No.* 2) [1950] N.Z.L.R. 433.

The determination of this question was held to be largely a matter of interpretation of the relevant statute, *viz.*, the Control of Prices Act, 1947 (N.Z.). That statute created a special Tribunal, known as the Price Tribunal and provided that the general duties and functions of the Tribunal should be (inter alia) ' to fix prices for goods and services '. The statute further provided for the holding of sittings by the Tribunal and for the taking of evidence on oath and that every sitting of the Tribunal should, with certain specified exceptions, be in public.

Hutchison J. held that the making of a Price Order by the Tribunal was, in substance, a legislative act. He reached this conclusion on a consideration of the distinction between a judicial act and a legislative act made by the Supreme Court of the United States in the *Sinking Fund Cases* (1878) 99 U.S. 700: ' The one

determines what the law is, and what the rights of the parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it'. But that decision did not conclude the matter, because, even if the making of a Price Order was legislative in substance, the act of making it might be judicial in procedure. As stated by Rich J. in *Rola Co. (Australia) Pty., Ltd.* v. *Commonwealth* (1944) 69 C.L.R. 185: 'If [a person] is empowered to impose on [other persons] new legal duties or liabilities from which they were previously free, or to alter or abrogate legal rights to which they were previously entitled, his power is not judicial, although in exercising it he may be, and commonly is, subject to a legal duty to act judicially (that is, to observe the principles of natural justice)'.

The learned judge held that the act of making a Price Order by the Tribunal was judicial in procedure. The Tribunal therefore had to act judicially. He reached this conclusion on the grounds:

(a) that the name 'Tribunal' pointed in that direction, though he admitted that this was not conclusive;

(b) that the Tribunal held 'sittings' and made 'decisions'; that the matters before it were described as 'cases'; that it had, in general, to sit in public, and that it could take evidence on oath; and

(c) that the evidence showed that the Tribunal considered itself to be called on to act judicially.

In the instant case the Tribunal, in making the relevant Price Order, had not acted judicially, because the plaintiff company was not given the opportunity of being heard before the Order was made. Consequently the Order was quashed.

As the New South Wales case of *Re Gosling* (1943) 43 N.S.W.S.R. 312 which was strongly relied on by the defendant, shows price fixing can be made a legislative act, to be done in a legislative and not a judicial manner. But whether that end is reached depends on the words of the empowering statute. A draftsman who wishes to put such legislative acts beyond the control of the courts must be careful in the choice of his words, for, as the authorities show, the courts lean in favour of construing the words as requiring the appropriate authority to act in a judicial manner and thus to make its orders subject to the court's supervisory jurisdiction.

A. G. DAVIS.

## RUSSIAN MARRIAGES—PASSPORT ENTRIES—FRUSTRATION

IN *Kenward* v. *Kenward* [1950] 2 All E.R. 297 the Court of Appeal pronounced upon the validity of a marriage contracted in the U.S.S.R. between a British subject domiciled in England and a

Russian subject domiciled somewhere in the U.S.S.R.[1] Petitions for nullity had been presented simultaneously by four husbands who, having contracted such marriages, were faced with a situation in which the Russian authorities refused to allow the wives to leave the Union, or, alternatively, the husbands to join them there. It was contended that Russian formalities of marriage had not been complied with, and, further, that the parties had not consented to marry: see *sub nom. Way* v. *Way* [1949] 2 All E.R. 959. In the case of Way, Hodson J. finding that the wife had wilfully refused to consummate the marriage, granted him a decree; in the case of Rowley, there was an alternative prayer for divorce based on adultery, and the petition was adjourned to enable further evidence to be adduced; Kenward's petition was dismissed, and Whitehead's was adjourned to await the fate of Kenward's proposed appeal, which, as will be seen, was successful.

The Master of the Rolls observed in *Kenward* that the 'significance of the appeal may well be said to go beyond that which attaches to the individual characters in the case'. It is to be regretted that at no stage did the King's Proctor intervene to argue on behalf of the wives. Sir Raymond Evershed agreed that the action of the Soviet Government shocked the conscience, but he carefully observed that 'it is no part of the judicial function to indulge in unregulated benevolence', especially as 'it would be wrong, and, indeed, unjust to the Soviet authorities, to suppose that what they have done . . . is something the like of which is to be found nowhere else in the world' (pp. 298, 305).[2] But he concluded that there was such a failure to comply with Russian formalities as to show 'as a matter of necessary inference that the officials who were concerned in this matter did not themselves regard this marriage as being more than a casual affair, not in the least likely to last more than some forty-eight hours' (p. 306). Hodson J., appraising certain omissions in the marriage ceremonies, had accepted registration of the marriage under section 2 of the Russian Code as indisputable evidence *as between the parties* of the existence of a marriage, 'at any rate *as to matters of form*' (*Way*, p. 962). Sir Raymond Evershed, without giving special attention to the italicised phrases, disagreed with Hodson J.: in the case of a bigamous marriage, it would be 'obvious' that the certificate of registration could be set aside. But it seems that the Soviet practice is to treat bigamy as a ground of divorce, not of nullity.[3] Further, with respect, bigamy is not a matter of 'form', and,

[1] It was not suggested that the exact Republic in which the woman lived, or in which the marriage took place, was of any relevance. But see G. M. Sverdlov, 'Modern Soviet Divorce Practice' (1948) 11 M.L.R. 163, 170, as to different laws in the Republics.

[2] See (1950) 'Current Legal Problems' at p. 245 and also examples in 'Consent of the Parties to their Marriage', *supra*, 14 M.L.R. p. 1.

[3] See Sverdlov, *supra*, pp. 169–70.

even in English law, it is not necessarily obvious that a party has an automatic right to set aside a bigamous marriage in such circumstances: a petitioner may be estopped *inter partes* from impeaching a second (bigamous) marriage into which he or she has entered [4]; *aliter* for some other interested party. The Master of the Rolls made no such distinction. Certain questions as to freedom from venereal disease, insanity and tuberculosis had not been put to the parties, though the Code required it, but Sir Raymond attached more importance to the failure to record the marriage in the petitioner's passport, 'because once that entry was made it would be impossible for the husband, if he had ever been so minded, to conceal the fact that he had been married'. The Soviet authorities 'deliberately forbore to do what they ought to have done and failed to make the entry which would have made it *plain to the world* that the husband had married the wife' (p. 307). Both the Master of the Rolls and Bucknill L.J. thought that, as a result of these omissions, 'the Russian officials in charge of the marriage registry at Archangel did not intend that these two people should contract a valid marriage' (p. 309, also p. 307).[5]

One may consider these questions. (1) To what extent, if at all, is the intention of the *celebrant* of a marriage relevant to the validity of that marriage? (2) For a marriage to be valid in English law, do the parties, at time of celebration, have to make it 'plain to the whole world' that they are married? (Cf. *Dancer* v. *Dancer* [1949] P. 147, 151, 153: in case on publication of banns in England, knowledge of local community emphasised.) In any event, it appears ([1950] 2 All E.R. at p. 301) that Kenward had two passports, an 'English' one and a 'Russian' one! In which should the entry have been made? Would an entry in one alone be sufficient notice to the 'world'? If in both, by what authority would an entry of that nature be made in a British passport? (3) Is a passport a document to which the whole world, or a local community, has access, as against a certificate of registration of a marriage? [6] (4) Would it have made any difference to the result in *Kenward* (or to a parallel case in English domestic law) if the Russian wife had been imprisoned for life two days or immediately after the ceremony for some offence she had committed? Would the husband's knowledge at time of marriage of this offence and of the punishment therefor be relevant? Would his access to

[4] See, for example, *Woodland* v. *Woodland* [1928] P. 169, and the cases discussed in the article mentioned in footnote 2.

[5] Bucknill L.J. thought that the register was not signed by the parties (pp. 308–9.); Hodson J. had decided this question of fact differently (*Way*, pp. 960–61).

[6] A passport 'is a document issued in the name of the sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be . . . used for that individual's *protection as a British subject* in foreign countries': *R.* v. *Brailsford* [1905] 2 K. B. 730, 745, approved in *Joyce* v. *D.P.P.* [1946] A.C. 347, 369.

Russia (or to the English prison) be material? (5) What would be the position if Kenward's wife had 'escaped' from Russia? Was the marriage *ipso jure* void, not merely voidable, anyway?

It was further pleaded, though not persisted in before Hodson J., that marriage as understood in the U.S.S.R. was not a Christian marriage, namely the 'voluntary union for life of one man with one woman to the exclusion of all others' (*Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130). Hodson J., *obiter*, thought that the Court of Appeal had decided the point in *Nachimson* v. *Nachimson* [1930] P. 217, where it was held that simplicity of dissolution does not invalidate the existence of a marriage. Sir Raymond Evershed observed (p. 303) that 'in England it is now not so difficult in certain circumstances to dissolve a marriage'. The 'fundamental conception' was a 'union for life of one man and one woman to the exclusion of all others. The parties enter into matrimony in that state of mind'. (Is the 'state of mind' of the parties really a test of a Christian marriage? A *potentially* polygamous marriage was held not to be Christian, though one of the parties died without either of them having in fact contracted a second marriage as permitted by the local law: *Re Bethell* (1888) 38 Ch.D. 220).

It was argued in *Kenward* that, admitting that there was capacity for the parties to marry, and that the formalities had been complied with, nevertheless the marriage could be examined to see whether it complied with 'the essentials of marriage as understood by the law of England'. The essential attacked in *Kenward* was not dissolubility, as in *Nachimson*, but *consortium*. The Master of the Rolls accepted this distinction, especially as *Nachimson* was concerned with two persons domiciled in Russia at the relevant time; further, Russian law as to mode of dissolution had changed since that decision. Section 9 of the Russian Code, concerning 'the order of keeping the common household' and 'change of place of residence of one of the spouses' was read together with a 'somewhat cryptic note' of a Russian Supreme Court decision, *viz.*, 'Marriage does not impose on the spouses a duty of living together'. Sir Raymond said that the provision as to residence was practically the same as present-day English law; nor did the Supreme Court judgment involve 'so great a denial of the elementary principles of *consortium* as would justify this court in saying that on that ground it is no marriage at all'.

On the doctrine of frustration, Hodson J., referring to *Niboyet* v. *Niboyet* (1878) 4 P.D. 1, 11, observed that this doctrine had never been applied and 'has no application' to the status of marriage as opposed to a contract to marry. On appeal, however, it was argued that 'as these marriages have been frustrated in fact it is arguable that they should also be held to have been frustrated in law' (see (1950) 66 L.Q.R. at p. 157). The novelty of the frustration doctrine in marriage law was contended to be due to

the old ecclesiastical notion of indissolubility, to the recent innovation of the doctrine of frustration as applied to a *nexus*, contractual or otherwise, and to the very limited scope within which the doctrine operated in marriage law : ' If ', it was argued, ' owing to the occurrence of an irresistible and extraneous event, neither party can thence forward enjoy any of the rights or fulfil any of the obligations of the marriage state, the marriage is frustrated, and the courts in the interest of common sense and justice will declare that the marriage has been terminated on the occurrence of that event.' The Master of the Rolls would not pronounce finally on this carefully framed submission. He agreed that, ' as an ordinary matter of language ', this marriage has been frustrated, but the doctrine might result in ' some remarkable consequences. How is the court to decide whether the event which has happened is not only extraneous but irresistible ? If the doctrine is to be applied to marriages between domiciled Englishmen and foreigners, *there is no reason why it should stop there and should not apply to marriages between two domiciled English persons. If the latter, then it would appear to introduce a ground for dissolution of marriage which is not found in the statute* '. Bucknill L.J. agreed.

The language of the submission appears to be based on the language used by Lord Macmillan in *Denny Mott* v. *Fraser* [1944] A.C. 265, 272, where he said: ' The further fulfilment of their mutual obligations has been brought to an abrupt stop by an irresistible, extraneous cause for which neither party is responsible '. Lord Wright, therein (p. 276), referred to *Hirji Mulji's Case* [1926] A.C. 497, 509, 510, where Lord Sumner again emphasises that, ' when frustration occurs, it is automatic, and that its legal effect depends not on the intention of the parties or even on their knowledge as to the event, but on its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the venture '. Applying the result of this doctrine to marriage, one concludes that a marriage that is ' frustrated ' is *ipso jure* void and not voidable : while anyone may attack the validity of a void marriage, because it is automatically void, only the parties themselves may impeach a voidable marriage (see, *e.g.*, *Fowke* v. *Fowke* [1938] Ch. 774, 780–82). Further, to ' go on ' with a frustrated contract means that the parties make a new contract : this cannot be done merely by mutual consent in the case of a void marriage. Denning L.J., however, preferred to rest his judgment in *Kenward* on the ground that the marriage was ' *voidable* by our law by reason of a condition which has failed '. The learned judge set out some of the reasons for which a marriage may be voidable.[7] He agreed that as to English marriages, when both the parties are domiciled

[7] Denning L.J. considered impotence as a cause ' which only comes into being after the marriage ' : impotence as a cause of annulment must exist at the time of marriage, *Brown* v. *Brown* (1828) 1 Hag.Ecc. 523. The possible suggestion that impotence arising *after* marriage makes that marriage voidable because ' frustrated ', while in accord with the frustration doctrine, is in

here, ' we have no authority for introducing any new condition by way of frustration '. But with foreign marriages, where both parties are domiciled in the country of celebration, the *lex loci celebrationis* governs the validity of the marriage : ' (we) do not import additional conditions from our own jurisprudence. If it is valid there, then, even if it lacks in our eyes some of the essentials of marriage, as, for instance, if it is potentially polygamous, we still regard it here, for many purposes, as a valid marriage: *Baindail* v. *Baindail* [1946] P. 122 '. But, differing from Sir Raymond Evershed, Denning L.J. thought the position different for marriages between persons domiciled in different countries: formal validity was there governed by the *lex loci celebrationis*, but its substantial validity might depend on the personal law of one of the parties:—

> ' The personal law of one party may attach a fundamental condition to marriage which does not exist in the personal law of the other, and, if he marries on the basis that that fundamental condition will apply, then it would be most unjust to hold him to the marriage after the condition has been broken or failed. It all depends on whether the parties marry on that basis or not. If they do, then you find that a marriage, although valid by the local law, is voidable by reason of a condition imported by the personal law of one of the parties '.[8]

After drawing certain illustrations from polygamous marriages, Denning L.J. restated his view, and went on:—

> ' It was a condition of the marriage that the parties should be allowed to live together. The parties intended to come to England to live, and in England the right to matrimonial *consortium* is an essential condition of every marriage, . . . imported by his personal law. That condition has been utterly destroyed by the subsequent action of the Soviet Government . . . . Justice requires that the husband should be free from this illusory marriage '.

Is the right to matrimonial *consortium* ' an essential condition ' of marriage in England? A spouse is entitled to the comfort and society of the other, and an agreement made before marriage to live apart thereafter is void, though the marriage is good (*Brodie* v. *Brodie* [1917] P. 271) : such an agreement made after marriage is good. But down to 1937, wilful refusal to consummate was not as such a ground of annulment (*Napier* v. *Napier* [1915] P. 184, 190) and desertion by itself was not a ground of divorce, still less of nullity. Even after 1937, consummation is not a *sine qua non* of marriage; it is only so at the instance of one of the spouses. Loss

effect rejected by Denning L.J. later on. See also *British Movietonews, Ltd.* v. *London Cinemas* [1950] 2 All E.R. 390, 396, on ' implied terms '.

[8] This last sentence should be contrasted with the principle of *Chetti* v. *Chetti* [1909] P. 67, 78, that a disability of a personal character imposed by his domiciliary law does not prevent a man's marriage, in breach of that disability, in this country: one would have to ascertain what is a disability of a personal character, as opposed to ' conditions imported '.

of conjugal rights was not and is not a ground of nullity (see *Marshall* v. *Marshall* (1879) 5 P.D. 19, 23). A marriage is not void even when one of the parties is deserted immediately after the ceremony : see *De Laubenque* v. *De Laubenque* [1899] P. 42; also *Weatherley* v. *Weatherley* [1947] A.C. 628. As to cruelty, see *Kaslefsky* v. *Kaslefsky* [1950] 2 All E.R. 398, 403, where a wife had shown 'a complete disregard of her wifely duties'. Denning L.J. refused to dissolve the marriage because her behaviour (which included refusal of sexual intercourse, 'the natural bond of marriage', the wilful refusal of which 'causes a marriage to disintegrate') was not 'aimed at' the husband :—

> 'If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage is itself imperilled'.

No reference was made in *Kaslefsky* to the fifth category of *Blunt* v. *Blunt* [1943] A.C. 517, 525 : cf. *Hosegood* v. *Hosegood* (1950) 66 T.L.R. 735.

The view on frustration of marriage taken by Sir Raymond Evershed, Bucknill L.J. and Hodson J. is respectfully preferred to that of Denning L.J.

One may briefly refer to Denning L.J.'s assignment of 'substantial validity' both to the personal law of each of the parties, and, later on, to the law of the place where the parties intend to live (cf. *De Reneville* v. *De Reneville* [1948] P. 100, 114). His observations on polygamous marriages were strictly *obiter*. The learned judge said of a marriage at a registry office in England between a domiciled Englishwoman and 'a man of a polygamous race' that it is a *condition* of the marriage that it shall be monogamous because the 'substantial validity as well as its formal validity depends on the personal law of the wife and not on the personal law of the husband'. Is not knowledge by the wife at the material time of the relevant facts and a resultant estoppel a criterion in these matters? Is not the personal law of the parties more relevant than the place of marriage? (See (1950) 13 M.L.R. p. 247.) Denning L.J. states that knowledge is relevant if a man marries a woman in her homeland 'well knowing the kind of marriage into which he is entering'. One may not illogically infer from Denning L.J.'s 'imported' condition (that a marriage is voidable where a husband takes a second wife abroad after marriage in England) that a spouse whose partner 'marries' bigamously is entitled to a decree of *nullity* because of a broken condition. (Incidentally, *Connolly* v. *Woolrich* (1867) 11 L.C.J. 197; for later history see Falconbridge, *Conflict of Laws*, pp. 654 ff., is in conflict with *Re Bethell*; Denning L.J. thought this latter case would be decided differently today: and *Baindail* dealt with a marriage in

England *after* a prior one in India; there was no mention therein of conditions.)

In *Adams* v. *Adams* [1941] 1 K.B. 536, 541, Scott L.J., dealing with the terms ' void ' and ' voidable ', pointed out how ' a metaphor from the law of contract . . . is not truly appropriate to the law of status '. The use of these words in marriage law, though accepted by the judges, ' lends itself to misuse, and may cause confusion '. And, as was said in a Scottish case on marriage, ' No conditions can be attached to it. No qualifications can be made on its effect. . . . This doctrine has never been questioned ' (*Lang* v. *Lang*, 1921 S.C. 44, 51). It is submitted that on this point English and Scottish marriage laws are identical, that spouses may not appeal to the principles of the ordinary law of contract, except as to their consent to the marriage.

*Way* v. *Way* was not overruled on all points decided therein. It is authority for the proposition that questions of consent of the parties to marriage in conflict of laws are determined by the personal law of each of the parties (p. 963, where Hodson J. also refers, in this connection, to the ' matrimonial law ' of the parties). Finally, Hodson J. decided (p. 964) that wilful refusal to consummate a marriage is referable to the law of the matrimonial domicile of the parties: no argument was addressed to him on this point, no reference was made to the two different solutions for this same problem suggested by Barnard J. in *Robert* v. *Robert* [1947] P. 164 (see 13 M.L.R. pp. 243–44).

The approach of the Court of Appeal to *Kenward* leads one to wonder why these cases of the utmost public concern were not dealt with in a public way, namely by Act of Parliament. This procedure would have been fairer to the ' wives ': someone would have argued their case. English law knows of many classes of ' hard cases ' for which there is no ' just ' solution. Hodson J., who certainly was not lacking in sympathy with the petitioners, bore this in mind, and many lawyers will appreciate his refusal, without further legislation, to stretch the law to a point where its extension becomes difficult or impossible to justify on existing provisions and principles.

Joseph Jackson.

## Negligence—Loss of Consortium by Wife

The primary interest of *Best* v. *Samuel Fox & Co., Ltd.* [1950] 2 All E.R. 798, lies in its novelty. The tort of enticement is not particularly well illustrated by decided cases and this is a useful addition to their number.

The facts of the case are unusual. A steel erector was injured by the negligence of his employers and in a subsequent action obtained substantial damages. As a result of his injuries he was

rendered sterile and incapable of having sexual intercourse with his wife. Consequently she suffered in health and brought this independent action against her husband's employers, claiming damages for their interference with her right to the *consortium* of her husband. There was no evidence that the defendants knew at the time of the accident that the injured man was married.

Croom-Johnson J., before whom the case was tried at Leeds Assizes, dismissed the objection that the wife's claim was unprecedented. 'It is admitted', he said, 'that a claim of this nature is completely novel. It has not, apparently, arisen before, and there is no case which indicates that anything of this sort has ever been canvassed before . . . but the law of England is a living law. It develops, and must develop, according to changes in the social life and social outlook' (at p. 800). Disregarding the novelty of the case, the only question to be decided was, '. . . whether the present case is new in principle or new in the instance . . .' (at p. 801).

In searching for the principle the first consideration was whether the wife's claim could be considered as a 'new instance' of the old principle of enticement. As already stated the authorities on this particular tort are few. It was only in 1932 that the dust was shaken off this topic in *Place* v. *Searle* [1932] 2 K.B. 497. From an examination of the few decided cases on enticement Croom-Johnson J. extracted the following two constituents of that tort, *viz.*: 'that the person sued must know that the relationship of husband and wife exists, and must have done some positive act in the way of enticement (some wilful act) to deprive the person suing of the benefits and advantages of that consortium' (at p. 802). In the case under consideration neither condition was satisfied. In other words it was a case 'new in principle' and therefore irremediable except by legislative action.

It is submitted that even had the employers been aware of the fact that the injured man was married, the absence of any wilful act specifically directed to deprive the wife of consortium would have been fatal to her claim under this head.

Moreover, ignorance of the marital relationship was likewise fatal to the wife's contention that the defendants were liable for interfering with her contractual right to the consortium of her husband. The learned judge denied that this right was contractual in nature but concluded that even if it were, the fact that the defendants were unaware of the marital relationship removed the wife's claim out of the *Lumley* v. *Gye* class of cases. Knowledge of the existence of a contract is the basis of the tortious liability for procuring its breach.

It is noteworthy that the same conclusion was reached by McCardie J. in *Place* v. *Searle*. He rejected counsel's contention, 'that the marriage ceremony carried with it an imperative and

permanent contract between husband and wife for the full performance of their respective matrimonial obligations and that anyone who knowingly induced a wife (or husband) to break these obligations was guilty of a tort. . . . I do not see how the principle of *Lumley* v. *Gye* and the like cases can apply' (at p. 503).

Finally, Croom-Johnson J. considered whether the wife's loss of consortium could be considered part of the direct physical consequences of the defendants' negligence. Here again the wife's claim failed since the defendants' liability could not be increased to include injuries to a third party. Like the fishwife in *Bourhill* v. *Young* [1943] A.C. 92, the plaintiff could not establish a duty of care between the defendants and herself, or, to use Lord Atkin's celebrated test in *Donoghue* v. *Stevenson* [1932] A.C. 562, she could not be classified as a 'neighbour' of the defendants in respect of the duty they owed to people in that category.

Looking at the broader issues of this case it might firstly be asked what is the precise nature of this 'consortium' which the tort of enticement seeks to protect? To this question no unqualified answer can be given since the decided cases reveal a reluctance on the part of the judges to define the term. Historically, the conception of 'consortium' is based on the notion that the wife is a servant of the husband and in an action for the loss of consortium by enticement the emphasis is on loss of services. If the mutual right to have sexual intercourse forms any part of consortium, it is not a major part. Moreover, in the present case, allowance must be made for the fact that the House of Lords in *Baxter* v. *Baxter* [1948] A.C. 274 stated categorically that 'the procreation of children is (not) the principal end of marriage' (*per* Viscount Jowitt L.C. at p. 286).

A second question is whether the plaintiff in *Best's Case* should have been allowed to recover damages from the defendant company on grounds other than those raised in the action. It would be imprudent to do more than raise the question in this note since the case is expected to go to the Court of Appeal. One *feels* that the wife deserves to recover but it is difficult to ascertain any established legal principle on which she might do so.

*Best* v. *Samuel Fox & Co., Ltd.*, is a perfect example of the mistake of trying to put new wine into old bottles. Whether the Court of Appeal, given the opportunity, will be able to supply a new bottle, remains to be seen.

Eric C. E. Todd.

## Insanity as a Defence to Cruelty

It has long been uncertain whether a good defence to proceedings for divorce on the ground of cruelty can be founded on the fact that the respondent was insane at the time of the acts of cruelty

alleged. The numerous dicta were reviewed by the Court of Appeal in *White* v. *White* [1950] P. 49, but as was pointed out in a note in this Journal (vol. 13, p. 103), the learned Lord Justices were unable to agree in their reasons for their unanimous decision. It has now been decided in *Lissack* v. *Lissack* [1950] 2 All E.R. 233, in the High Court, that it is no defence to an allegation of cruelty in divorce proceedings that the respondent was insane. If this decision is accepted and followed, it will resolve a doubt that has existed since the law of divorce was introduced a century ago.

After a careful review of the authorities, the learned judge who decided *Lissack* v. *Lissack*, Pearce J., accepted the whole reasoning of Denning L.J., who in *White* v. *White* laid down the rule that insanity can never, with one possible exception, be a defence to a charge of cruelty. But the two learned Lord Justices who sat with Denning L.J. in the Court of Appeal repudiated that rule and decided the appeal on the ground that the respondent had not in fact been insane according to the proper test. We are therefore at liberty to prefer either view.

In the case-note in this Journal, which is referred to above, Professor L. C. B. Gower gives powerful support to the view expressed by Denning L.J. The present writer respectfully prefers the contrary opinion.

The main authority cited by Denning L.J. for the view that insanity is no defence, is a dictum of Lord Stowell in *Kirkman* v. *Kirkman* (1807) 1 Hagg. Cons. 409. Torn from its context, this fragment of a sentence—for it is no more—gives to the contention some support; this collapses however when the whole of Lord Stowell's judgment is read, for no question of insanity arose and Lord Stowell was not referring to insanity, but to passionate jealousy. It is submitted that this dictum cannot be preferred to the clear statement of Sir Cresswell Cresswell in *Hall* v. *Hall* (1864) 3 Sw. & Tr. 347, 349, where he said :—

> 'Thus, I have no doubt that cruelty does not cease to be a cause of suit if it proceeded from "violent and disorderly affections", as said in one case, or from "violence of disposition, want of moral control or eccentricity," as said in another, or "from a liability to become excited in controversy", in the language of a third; but madness, dementia, positive disease of the mind, this is quite another matter. An insane man is likely enough to be dangerous to his wife's personal safety, but the remedy lies in the restraint of the husband, not the release of the wife.'

One cannot discuss the question of principle without examining the whole conception of divorce. Now Professor Gower considers that the view expressed by Denning L.J., and again by Pearce J., is preferable from every point of view, and particularly as it is based on a sounder conception of divorce. This conception is that the purpose of a decree of divorce is rather to give relief to the petitioner than to punish the respondent; indeed Denning L.J. emphatically

asserted that it is not a question of punishing the respondent, but only of giving the petitioner relief from a situation that has been rendered intolerable. In the present writer's view, however, a divorce does not merely give 'relief', for a separation is intended to do that; it is an unjustifiable euphemism to say that the Divorce Court only gives relief, when in fact it breaks a most solemn bond. Moreover, a decree of divorce may well be a very severe punishment for the respondent, and there is no justification for leaving this possibility out of account entirely. Thirdly, to reject insanity as a defence to a charge of cruelty may create injustice, if the insanity is curable. Fourthly, there seems no logical reason why a wife, who could get a divorce to relieve her of a mad husband, should not equally be relieved of an invalid or penniless husband. If relief is the sole criterion, the wife of a poor man is as likely to need relief from unintended cruelty as the wife of a man suffering from mental disease. It is accordingly the hope of the present writer, with profound respect to the learned authorities with whom he is unable to agree, that the decision in *Lissack* v. *Lissack* will not be followed.

Professor Gower suggested in his note that the proper test of insanity in divorce proceedings should not be the McNaghten Rules. In *Lissack* v. *Lissack* the learned judge proposed the following as the proper test: was the person alleged to be of unsound mind at the date in question capable of understanding the nature of the act he was performing?

Lastly, it is hoped that when the Court of Appeal finally decide whether insanity is a good defence to a petition for cruelty, the Scottish cases will not be overlooked; in particular, *Inglis* v. *Inglis* 1931 S.C. 547, *MacGregor* v. *M'Lachlan* 1945 S.C. 382, and *Harrison* v. *Dunlop* 1950 S.C. 227.

D. C. Potter.

## Honour Among Trustees

It is strange that the situation disclosed in *Buttle* v. *Saunders* [1950] 2 All E.R. 193 does not seem to have come before the courts before. In essence, the question is what trustees for sale ought to do if, after having committed themselves morally, but not legally, to selling land to A, they receive a better offer from B. Although the instincts of honourable men of business might well impel them to close the deal with A, it is hardly surprising that Wynn-Parry J. should have held that their paramount duty was to obtain the best possible price for their beneficiaries. Accordingly, the trustees should probe B's offer, at all events if this could be done without serious risk to A's offer being withdrawn, and if B was willing to bind himself forthwith on the terms provisionally agreed with A, but at a higher price, then the trustees

should sell the property to him. No sense of commercial morality, however finely developed, must permit a trustee to sing to his beneficiary—

I could not love thee, Dear, so much,
Lov'd I not honour more.

R. E. MEGARRY.

## THE HALLINAN CASE

IN the recent prosecution of the American trade union leader Harry Bridges for perjury, his counsel, Mr. Vincent Hallinan, a leader of the California Bar, was sentenced to six months' imprisonment for contempt of court in the middle of the Bridges' trial. As the facts become more widely known it is likely that lawyers in this country will want to read for themselves the official transcript of the trial; to facilitate this, the following notes give in brackets frequent page references to the official transcript.

To understand the contempt proceedings some information on the substantive *Bridges' Case* is necessary.

In 1939 and again in 1941 deportation proceedings were started against Bridges on the grounds that he was or had been a communist; it was alleged that he had been a secret member of the Communist Party under the names of Harvey and/or Canfield and/or Rossi and/or Dorgan. The 1939 proceedings terminated in a hearing before the highly respected Dean of Harvard Law School, Judge Landis. The 1941 proceedings reached the Supreme Court of the United States. These proceedings are reported under the name *Bridges* v. *Wixon* in 144 Fed. (2d) 927 and 326 U. S. 135. In these proceedings the charges against Bridges were rejected, the testimony of some 120 government witnesses was not accepted, evidence was received of government officials offering improper inducements to witnesses to testify and the deportation proceedings were dropped. The Supreme Court decision on the latter case, given in 1945, included the following remarks:—

> 'For more than a decade powerful economic and social forces have combined with public and private agencies to seek the deportation of Harry Bridges, who came to this country in 1920 from Australia. Emerging from the Pacific Coast maritime strike of 1934 as a recognised labor leader in that area, Bridges incurred the hatred and hostility of those whose interests coincided directly or indirectly with the vicious and inhuman practices towards longshoremen that Bridges was combatting. His personal viewpoint on certain matters also antagonised many people of more conservative leanings. Agitation for his deportation arose. Industrial and farming organisations, veterans' groups, city police departments and private undercover agents all joined in an unremitting effort

> to deport him on the ground that he was connected with organisations dedicated to the overthrow of the Government of the United States by force and violence. Wiretapping, searches and seizures without warrants and other forms of invasion of the right of privacy have been widely employed in this deportation drive '.

When this Supreme Court decision was given in June, 1945, and the deportation proceedings thereupon were dropped, Bridges at once applied again for naturalisation which was granted in September, 1945.

The prosecution case in the recent perjury trial was that Bridges had committed perjury in September, 1945, when he swore during his naturalisation proceedings that he had never belonged to the Communist Party in the U.S.A. (479). The prosecution said that he joined the Communist Party in 1933 in the name of Dorgan (486) and had actually been elected to the Central Committee of that Party in 1936 and 1938 under the name of Rossi (487).

The defence case may well have been drafted with an eye to the opinions of Judge Landis and other judges and the Supreme Court in the earlier proceedings. They said that the whole of the present prosecution was part of an elaborate conspiracy to destroy Bridges (518, 527, 551 and passim), ' a conspiracy of witnesses to take the witness stand and swear a falsehood, namely, that Harry Bridges was or is a member of the Communist Party ' (518), that this conspiracy started in 1934 when he first came to the fore as a dockers' leader (527), that the two deportation proceedings were all part of the same conspiracy (728), and that the persons behind the attempt to destroy Bridges were first the dock employers (509) and later corrupt rival trade union and political bosses (549–55) and government officials (560).

The ground for the sentence on Mr. Hallinan was ' attempting to circumvent the ruling of this court and to place before this jury by indirection matters that have been ruled out, matters that are immaterial and that are irrelevant ' (738, 740, 802).

The ruling arose out of an application made at a preliminary hearing before Mr. Hallinan came into the case, when the defence had asked the judge to declare the present charges res judicata in view of the previous deportation proceedings. The judge had ruled, and repeated the ruling to Mr. Hallinan, ' that the question of jeopardy, former acquittal and res adjudicata were out of the case ' (516); and he further ruled that the deportation proceedings ' are moot, irrelevant and immaterial ' (516, 531). It is the second part of the ruling which is in question here, since Mr. Hallinan nowhere suggested that the doctrine of res judicata applied.

While it is no doubt true that res judicata did not apply, it is obvious that the fact that such distinguished tribunals had so decidedly passed judgment on what was virtually the same

question of fact would inevitably weigh heavily with any jury. Mr. Hallinan's object presumably was either to bring these facts before the jury or else to have them excluded on a definite ruling which if wrong would give him grounds for appeal: he also had to have clearly before the appeal court exactly what evidence had been excluded, so that if the exclusion was erroneous, the appeal court must agree that it was 'reversible error', and not merely 'harmless error'.

Immediately after the prosecution opening speech on Thursday afternoon, November 17, 1949, Mr. Hallinan, on the invitation of the court, rose to make his opening speech. He spoke for an hour on Thursday and another hour on Friday morning, setting out the background of Bridges' position in the Californian Trade Union world and the rivalries existing therein.

After the jury left on Thursday the judge warned Mr. Hallinan that his 'purpose was to go behind the court's ruling . . . that the doctrine of res adjudicata is not applicable here' (520), that any objections raised by the prosecution to historical matter would be sustained by the court (555), that the objection to such matter was that it was out of place in an opening statement but that he would be able to 'cross-examine without limitation' (527) and have a 'full, clear and sweeping cross-examination' (532).

From the nature of the prosecution case and still more of the defence, it was obvious that if Mr. Hallinan was to continue with his opening statement, he would have to introduce some historical matter. On Friday morning he avoided any reference to the previous proceedings; but in the absence of any clear ruling as to what historical matter was barred prosecution counsel broke in twenty-three times with objections to 'historical' or 'argumentative' matter, of which fifteen were sustained by the court.

On Monday afternoon it came to Mr. Hallinan's turn to cross-examine the first government witness, Mr. Garner, the Immigration Department lawyer who had had charge of Bridges' naturalisation proceedings in September, 1945, for the government. He cross-examined for about an hour asking questions about the witness' knowledge of illegal telephone wire-tapping by government agents and whether he knew at the time of these naturalisation proceedings that an array of sixty-two and fifty-nine witnesses put forward by his department in the 1939 and 1941 proceedings respectively had been discredited and disbelieved, and other questions designed to bring out that the witness had taken part in the conspiracy alleged in the defence—and no doubt also designed to bring before the jury the details of these previous deportation proceedings. During this hour's cross-examination the prosecution made twenty-three objections of which the court sustained twenty-two.

In the course of this cross-examination Mr. Hallinan twice implicitly invited the court to give a definite ruling on the admissibility of the line of questioning which he was then engaged on (705

and 733); for example (705) he said, 'While of course we are bound by the rulings of the court, we cannot afford to fall into the folly of refraining from asking questions which we deem proper, and having a ruling upon them, so as to preserve a correct record'. The court made no comment on the propriety of such proposed action and gave no ruling. Further the prosecution three times explicitly asked the court for a ruling on this line of questioning (735, 740, 741); in each case the court ignored the request and merely sustained or rejected the objection to the particular question involved. Finally Mr. Hallinan explicitly asked for a ruling which was refused (755) on the ground that it was then too late.

The next day (but without any further passages of arms) the court proceeded to find Mr. Hallinan guilty of contempt on the basis of various passages from his opening speech and his cross-examination of Mr. Garner.

The circumstances of this case are disturbing particularly when one remembers that they come from a country which claims to administer law on the same principles as we do in this country. It is no doubt unnecessary to point out that the *Bridges' Case* was a highly 'political' one; indeed that was given as a reason by the judge for excluding historical matter from the opening speech. Mr. Hallinan was not associated with the *Bridges' Case* until three weeks before the hearing in November, 1949. He is an advocate of great experience, skill and eloquence and was called in to conduct this *cause célèbre* in the normal way. All this sufficiently appears from the comments of the court and counsel on both sides during the case.

R. H. Whitty.

[We can hardly agree that either the law or practice in regard to contempt are the same in the U.S.A. as in this country, or indeed that there is any sort of uniformity between the Federal law and the law of the different States in the U.S.A. on this subject.[1] In particular the Federal law has been radically affected by Acts of Congress in 1831, and in 1914 (the Clayton Act). The former of these statutes was passed in the words of Mr. Justice Field because 'the power to punish for contempt was formerly so often abused for the purpose of gratifying personal dislikes'.[2]

We print the above note, however, because the committal of a distinguished advocate for contempt of court during his actual handling of his client's defence to a serious criminal charge must be disturbing to lawyers everywhere, for they are naturally jealous of their liberty of action in such cases.

[1] See 37 H.L.R. 1010.
[2] Quoted *ibid.* 1030.

It should be added that the relationship between bench and bar in the U.S.A. appears to be somewhat different from that existing in this country. Committals for contempt of lawyers for their handling of cases are almost unknown here in modern times, but they appear to be fairly common in the U.S.A., and accusations that they are used for the gratifying of personal dislike are still heard. This is a state of affairs which to English lawyers appears to be most unfortunate.

ED. M.L.R.]

# REVIEWS

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION. Edited by ARTHUR T. VANDERBILT. [New York: The Law Centre of New York University. 1949. xxxii and 752 pp. (with index).]

THIS is one of a series of volumes published under the auspices of the National Conference of Judicial Councils of the U.S.A. The general aim of the series is to make a nation-wide survey of the administration of justice in that country with a view to 'promoting a better, and more efficient judicial system'. The remarkably frank and far-sighted introduction to the present volume by Chief Justice Vanderbilt of New Jersey, formerly dean of the New York University Law School, shows how much American lawyers are concerned about the imperfections of their judicial system, and how much hard work they are prepared to put into the job of getting them removed. Some Englishmen scold Americans for being too complacent about the state of their institutions—these people are usually those who are the most satisfied that all is lovely in the home garden. The Chief Justice, however, is worried over the slowness of the progress made, and over the apathy of the majority of his fellow lawyers. That other American lawyers are equally concerned is proved by the work which has been put into this book. For it is a remarkable thing, especially to an Englishman, that the American Bar Association, which is after all representative of the practising profession, so continuously acts as a spearhead in the law reform movement in the U.S.A. On the present occasion also the National Conference of Judicial Councils which must number among its constituents some unprogressive States has furthered the efforts of the Bar Association by sponsoring the issue of this work. When one looks at our own Bar Council and Law Society and measures the part they have taken in pressing for the rather meagre reforms of the present century in this country, one is forced to admit that the organised profession in the U.S.A. is much more go-ahead.

The American Bar Association has a special committee on Improving the Administration of Justice, and that committee very sensibly took the view that in a country of the size of the U.S.A. and with all its numerous jurisdictions a competent factual survey of the legal situation over the whole country was called for. This book results from the survey which was in fact carried through. It is concerned with adjective rather than with substantive law, and as its title indicates it has in mind to secure minimum standards of practical achievement in all the individual States, which in effect means in the more backward States.

The survey deals with nine main problems. Some of these are not of much practical moment to English lawyers at the present time: for example, those concerned with the appointment of judges and their tenure of office. Others are of interest to us, though not to the same extent as to Americans. Among these is the working of the jury system which has not fallen from grace in America to the same extent as it has in this country, and gives rise to many problems which hardly at any time existed for us with our more homogeneous population. Nevertheless, although one does not often hear allegations that a jury panel has been 'organised', nor is much care taken with us to secure that the members of the jury reach a reasonable standard of intelligence, it is obvious that our arrangements in these and other aspects of the matter do leave the possibility of improvement, and here American experience could be helpful.

The procedure and functioning of State Administrative Agencies is so different in America from this country that experience there is perhaps of limited value to us. On the other hand the problems are basically similar (Cf. Schwartz, 'Delegated Legislation in America—Procedure and Safeguards' 11 M.L.R. 449, which it is gratifying to find cited in the work under review) and the amount of experience available from forty-eight States is so large as to provide a regular quarry for the student of administrative law. What is perhaps of the greatest interest in this chapter is the fact that it was the work of the American Bar Association's Committee on Administrative Agencies and Tribunals which led directly to the Model State Administrative Procedure Act, 1946, and the Federal Administrative Procedure Act of the same year; these put America far ahead of Great Britain in this matter. It seems that the Report of the Committee on Ministers' Powers (the Donoughmore Report) which is frequently referred to as authoritative in these pages, but which has been ignored by successive British Governments, played some part in awakening American legal opinion to the necessity for these reforms.

Another chapter which one turns to with expectation is that on Managing the Business of the Courts. Here again the much broken up American judicial administration, and the absence of anything like the Lord Chancellor's secretariat which has of recent years taken on some of the functions of management makes their experience of less value to us than one had hoped, but nevertheless there is much to learn, *e.g.*, from the almost fully integrated system of California. Again, more and more attention is being paid to judicial statistics which are in a sad way in this country, and have received little or no attention for years.

Other topics, such as pre-trial conferences described as 'an outstanding recent development for the improvement of trial practise', and used with great success in Wayne County, Michigan, since 1929; the reform of Trial Practise, where we already have many of the reforms recommended by the American Bar Association; and the reform of the Law of Evidence where the arrangements for expert witnesses seem to be much better than ours will prove of much interest to English lawyers.

Since this work is concerned with the question how far the reforms alluded to have been put into effect in the various States, the reforms themselves are not discussed in great detail. A number of these problems have, indeed, already been fully dealt with in the volumes of the Judicial Administration Series of which this work forms part, and to these reference may be made. One valuable feature of this book is a series of maps of the U.S.A. on which is indicated the extent to which the various reforms inquired into are shown by the survey to have been brought into effect. There are over sixty of these, and they give a clear idea of the present situation in a way that can be taken in at a glance.

C.

AMERICAN ADMINISTRATIVE LAW. By BERNARD SCHWARTZ, LL.M. (Harv.), PH.D.(Cantab), Assistant Professor of Law, New York University. With a Foreword by PROFESSOR E. C. S. WADE. [London : Sir Isaac Pitman & Sons, Ltd. 1950. xv and 144 pp. 25s.]

WE recently reviewed Professor Schwartz's book, *Law and the Executive in Britain* (13 M.L.R. 529), which is as useful to English students as to the Americans for whose benefit it was written. He has now placed his English readers further in his debt by this valuable introduction to American administrative law. Much has been written in recent years in criticism of English administrative law, and most writers have suggested that useful lessons are

to be learned from a study of the experience of France and the United States. Until recently, however, not enough information on these matters was readily accessible in England. Mrs. Sieghart's work, *Government by Decree,* has now removed any excuses for ignorance of the French *régime administratif* and Professor Schwartz has drawn an admirably clear outline of the American system.

Professor Schwartz shares most of Dr. Allen's apprehensions about the tendencies towards 'administrative lawlessness' in England, and he believes that we could profitably adopt some of the American safeguards against the abuse of executive powers. At the end of the book he gives the full text of the Federal Administrative Procedure Act, 1946, which embodies the most important of those safeguards. His viewpoint cannot be dismissed by vague allusions to differences in constitutional law and administrative structure. It is true that some types of legislation that are by no means uncommon in England—*e.g.,* legislation expressly excluding judicial review of administrative decisions, or denying parties affected by certain administrative action the right to be heard, or delegating virtually unrestricted legislative powers to the Executive—would be held unconstitutional in America. It is true, also, that the characteristic American administrative institution, the administrative agency, has no exact counterpart in England. But when all this is said, the subject-matter of delegated legislation and administrative adjudications do not differ widely in the two countries. Yet the differences between the procedures and safeguards adopted in the two countries are most striking. In America the administrative process tends to follow judicial forms, with their attendant formality and publicity; in modern England it is conditioned almost entirely by what are thought to be the requirements of administrative efficiency. If the Americans sometimes appear to have gone too far in the one direction, we have sometimes gone too far in the other. In the process of administrative adjudication here, for example, reports of inspectors at public inquiries are not disclosed to the parties, and few administrative tribunals give reasons for their decisions. In America agencies are required by statute to give reasoned decisions, and the reports of hearing examiners are published. In these matters publicity is surely, on balance, preferable to secretiveness save in the exceptional case. The status of the American hearing examiner differs from that of the English engineer-inspector conducting a local inquiry. The American officer usually has legal qualifications; he takes a more prominent part in the proceedings; and he has to announce an 'initial decision' which is subject to further appeal. Here the English practice of leaving the decision to 'the Minister' seems preferable in most fields (*e.g.,* town and country planning) in which inspectors are employed, since the decision on the subject-matter of the inquiry will often be governed by broad considerations of policy upon which other departments may have to be consulted.

The American rule-making process is likewise surrounded with publicity. (The chapter in which Professor Schwartz discusses the procedure and safeguards was published as an article in 11 M.L.R. 449.) It is usual to give extensive notice of the intention to make regulations, and opportunities for hearings of a semi-judicial character are often given by statute to parties opposed to the regulations. That these procedures are of value in promoting public confidence in the administrative process is generally conceded in America, but in England the somewhat similar (if more conservative) provisions of the Rules Publication Act, 1893, were largely ignored by the interests affected and were repealed by the Statutory Instruments Act, 1946. In any event, the elaborate American procedures would (in Sir Cecil Carr's words) 'hopelessly retard and obstruct' delegated legislation in England. However, the American techniques for ensuring adequate publicity of regulations when finally made may be worthy of detailed study.

Perhaps the most conspicuous difference between the two systems lies in the parts played by the courts in the review of administrative findings. In England judicial review can rarely be effectively invoked; in America it is

successfully invoked every day. The general agreement that review must be more than superficial partly explains the 'judicialisation' of the American administrative process, and in particular the compilation of enormous formal records in administrative adjudications. Administrative findings of fact must be supported by 'substantial evidence', that is, evidence which *might* satisfy a reasonable man. Professor Schwartz asserts that the substantial evidence rule is little more than a rule against capricious findings, and is therefore comparable with the attitude of English courts towards administrative decisions. One has the impression, however, that the rule has shown enough elasticity to enable American courts to substitute, in effect, their own independent judgment for the judgment of an agency where the agency has not been one which has commanded their confidence. Judicial review of the merits of administrative action inevitably tends to draw the Judiciary into the political arena. In the United States the Judiciary has in any case assumed the duty of passing upon the constitutionality of legislative action to implement political policies; and the controversies aroused by judicial decisions adverse to regulations or determinations made by agencies are mild in comparison with those which arose out of the major New Deal cases. English judges, on the other hand, have seldom had to consider the merits of policy decisions, and their remarkable reputation for impartial detachment is largely attributable to the fact that their functions are thus restricted. The introduction of a substantial evidence rule into English jurisprudence might well imperil that reputation. Rather than face such a prospect one is inclined to leave things as they are. In so far as decisions by administrative bodies should be subject to review, the function might well be entrusted to a new administrative appellate tribunal comparable with the *Conseil d'Etat*.

S. A. DE SMITH.

THE SENSE OF INJUSTICE. By EDMOND N. CAHN, Professor of Law, New York University School of Law. [New York : New York University Press. 1949. 186 pp. $3.50.]

THE first impression that an English reader has in taking up this book is a feeling of envy towards American legal authors that a collection of essays or lectures can be published in book form, on excellent paper, finely bound, and for a reasonable price. Few law books of this kind are publishable in England, and those few wear much humbler garments.

The author, besides being a professor of law at New York University where he lectures on the philosophy of law, is a member of the editorial committee of the Association of American Law Schools for the Twentieth Century Legal Philosophy Series; he is also chairman of the Conference on the Social Meaning of Legal Concepts at New York University, and he has for some years contributed the chapter on Jurisprudence to the *Annual Survey of American Law*. The purpose of this book, the first two parts of which have appeared in *The Yale Law Journal* (1916) and *The New York University Law Quarterly Review* (1948) respectively, is to present 'an anthropocentric view of the law'. Legal philosophers having concentrated their attention upon concepts and abstractions at the expense of what is 'vibrant, fleshly and individual', the hope is expressed that an anthropocentric approach may restore concepts to their proper dignity as ministers of the needs and satisfactions of living persons. In considering which concepts can be expected to cast the clearest light on the nature of law, Professor Cahn makes a sort of Hegelian search for the main antitheses of legal theory. These he asserts to be Justice and Power, Freedom and Order, Security and Change. Each of these antitheses is discussed in turn.

In the section on 'Justice and Power' the theory of law as a manifestation of applied power (divine or economic) is contrasted with the view that justice

or righteousness is the source, substance and ultimate end of law. And yet it seems that the search for justice has been given up (p. 11). One would certainly have thought this when a well-known modern English textbook on legal theory first appeared without any mention of 'justice' in the index. Justice is here described as the active process of remedying or preventing what would arouse the sense of injustice. We might be left entirely without empirical guidance, says the author, were it not for 'the sense of injustice' (p. 13), which gives its title to the book. The reader may think at first that this is a somewhat negative way of approach, until he remembers that Salmond took the notions of wrong and duty as the starting-point for an analysis of legal rights.

The discussion of the sense of injustice is, in our opinion, the most valuable part of the book. It is shown by means of illustrations to be concerned with the demands for equality, desert, human dignity, conscientious adjudication, and the fulfilment of common expectations (pp. 14–22). These are not intended to be exhaustive categories, but are described as overlapping facets. These aspects are ethical, but not merely so, for they are modified by being incorporated into the legal system. The sense of injustice is found to be an active, spontaneous source of law. 'A system of utterly unjust law could exist in the imagination only', it is well said, 'and could serve none but casuistic purposes'.

In the second antithesis, that between Freedom and Order, freedom is defined as the ability to move, mobility. Of the various kinds of freedom the most interesting discussion is that on 'mobility in simple communication', which is differentiated into seven rights: (1) to stand silent, (2) to express oneself by speaking or writing, (3) to persuade or inform, (4) not to hear, (5) to express oneself by hearing or reading, (6) to be persuaded or informed, (7) to receive an ideological variety. The fourth (the right to be let alone) was called by Justice Brandeis 'the most comprehensive of rights and the right most valued by civilised man'. The author foresees that the grand issues of the future will relate to the sixth and seventh rights. The right to be persuaded or informed has been recognised on curious grounds by the United States Supreme Court in two recent cases, where it was held that Jehovah's Witnesses had a constitutional right to propagandise on government property or on a company's land because the *residents* had a right to the opportunity to be persuaded or informed. On the other hand, the right to receive an ideological variety has fared poorly everywhere.

The third section on Security and Change shows very wide reading in philosophy and literature, but here the author's penchant for metaphor and analogy becomes accentuated. 'Once we decide to consider the fabric of social relations' he says, 'as a sort of moving platform . . . it is no longer difficult to systematise the study of the legal material applicable to the subject. Our moving platform can be so readily assimilated to a ship at sea that its strength and stability would almost inevitably suggest a hull and a keel. And if we follow these obvious indications, we can analyse the law's relations to human security under the headings: The Hull and the Keel: The Rail and the Cabin; The Chart and the Motive Power', and the rest of the discussion takes place under these headings. So far were these headings from clarifying the function of law that the reviewer felt at this point that he had been cast adrift in an open boat in the middle of the ocean. Analogies and metaphors should be avoided if they obscure the author's meaning rather than illuminate it. We are not qualified to test the appositeness of the many metaphors drawn in this book from numerous sciences, but we must step in to defend our musical terms, which at least we understand. The description: 'the polyphonic motifs that together make up the melody of juristic freedom' ought surely to read: 'the melodic motifs that together make up the polyphony of juristic freedom'; and we insist that a metronome serves to regulate

tempo, not rhythm. On the other hand, it is the absence of rhythm, not the absence of tune, that would make the dance (*semble* of free men) look grotesque (pp. 101–102).

O. HOOD PHILLIPS.

LIVING LAW OF DEMOCRATIC SOCIETY. By JEROME HALL, Professor of Law, Indiana University. [Indianapolis: The Bobbs-Merrill Company Inc. 1949. 146 pp.]

THE purpose of this book, which is based on a series of lectures given at Pacific University, Oregon, is to make a contribution to legal philosophy. The expression 'Living Law' was apparently introduced into modern jurisprudence by Savigny, though popularised by Ehrlich. The author says he is aware that the views expressed, if sound, support democratic institutions, but he sagely remarks that if scholarship happens to strengthen democracy that is no reason for disparaging it. The central inquiry of jurisprudence lies in the question: what is law? Law in its totality is found to be a fusion (distinctive coalescence) of form, value and fact. This analysis leads to the tripartite division of the book into (1) Law and Legal Method, (2) Law as Valuation, and (3) Law as Cultural Fact. The author's general approach is by means of intuition or common sense.

The first part contains a review of some of the main types of legal theory with sane and balanced judgments on each, including the legal positivism of Bentham and Austin, the prediction theory of the 'legal realists', Pound's theory of interests and social engineering, and legal semantics ('the solemn belief that Humpty Dumpty was a profound student of linguistics'). There is general agreement that command, power and coercion are essential attributes to positive law, but the question is whether these attributes are sufficient characterisations of positive law. The main conclusion from this section is the need for rewriting the history of legal philosophy, based on careful examination of the texts and relating ideas to their social background.

In the second part Professor Hall affirms the Stoic doctrine that justice (virtue, Natural Law) is an essential attribute of positive law, and that, as Aristotle said, 'true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws'. The history of legal philosophy is thus seen to be largely composed of a series of attacks on the foundations of Stoic jurisprudence and refutations of those attacks. A limited validity is conceded to the doctrines of Savigny's historical school, Bentham's hedonistic utilitarianism, Pound's pragmatism and Kelsen's pure theory of law. The importance of moral value in law is demonstrated positively by intuition and common sense. 'What is the best explanation of the meaning of our moral experience?', Professor Hall asks on page 72, and replies: 'The ultimate test of any theory is its persuasiveness in relation to important facts and experiences for which an explanation is sought' (p. 80). The ultimate political valuation of our culture, in the author's view, is the democratic ideal. This necessitates a modification of the Stoic doctrine especially must it include the consent of the governed.

We are told in the third part that, to apprehend the factuality of law more fully, we must explore the meaning of culture and distinguish those aspects of it which are legal. The basic institutions—language, art, knowledge, religion, economy, law and government—serve (1) to provide and safeguard the food supply, (2) to preserve the cohesion of the community, (3) to maintain order from within and safety from outside attack, and (4) more or less to facilitate value experience (pp. 111–113). Thus a necessary prerequisite to the full development of the theory of positive law is a sound cultural history of positive law from the ancient Greeks to our own times.

O. HOOD PHILLIPS.

FEDERAL RULES OF CRIMINAL PROCEDURE. With Notes and Institute Proceedings. Edited by HONORABLE ALEXANDER HOLTZOFF. [New York: University School of Law Institute —Proceedings, Vol. 6. $4.]

'UNTIL now federal criminal procedure has been shackled by heterogeneous legal concepts, their origin largely shrouded in the midst of ancient doctrine and discarded custom and usage. At the very inception of criminal cases the ends of justice have all too frequently been defeated by a bewildering array of pleas in bar, pleas in abatement, motions to quash, motions to dismiss and demurrers. No prosecutor desired to face such a barrage of technicality and few defence counsel enjoyed the prospect of preparing a series of tedious motions and pleas. The only benefactor of this confusion was perhaps the wily defendant to whom expense was immaterial but to whom delay was paramount. Further chaos was encountered in the many procedural steps which until now were regulated by a strange mixture of Federal laws, State laws, common law, and rules and decisions of courts, both State and Federal. These diverse points of view resulted in a legal "wilderness of single instances" utterly devoid of reason or uniformity; procedures varied from court to court so that an attorney from one State often found himself virtually unable to try a case in the Federal court of another State.'

So writes the Attorney-General of the United States in his Foreword to this valuable publication. In 1933 and 1940, after a long campaign by the legal profession, Congress passed two Acts which together gave the Supreme Court power to promulgate rules of pleading, practice and procedure in criminal cases. A similar rule-making power with respect to civil actions had already been conferred upon the Supreme Court, and the Federal Rules of Civil Procedure became effective in 1938. In order to prepare the new criminal rules the Supreme Court appointed an Advisory Committee under the chairmanship of Dean Arthur T. Vanderbilt. Recommendations were submitted to this Committee by the bench and bar of the circuits and districts of the Federal system, by State bar associations and other groups, and by individual lawyers. After four years of intensive work the Advisory Committee submitted its final draft to the Supreme Court. Thereafter the Rules, as now framed, were presented to Congress and became effective on March 21, 1946.

The Rules are sixty in number, and in the words of Judge Holtzoff, who was secretary of the Advisory Committee, they are intended to constitute 'a complete code, a brief code, tracing a Federal criminal case from its inception to its termination'. They are designed to expedite proceedings by avoidance of dilatory practice and needless expense, whilst at the same time preserving the right of every accused person to a fair and impartial trial. While many of the Rules do little more than restate the previously existing practice others introduce important innovations. Thus by Rule 4 warrants of arrest may now be executed at any place within the jurisdiction of the United States, instead of only in the issuing district. By Rule 7 a defendant may now waive indictment and consent to prosecution by information; this enables a defendant who wishes to plead guilty to felony to begin his sentence without spending weeks or months in jail awaiting the action of the grand jury. Rule 17 enables the court, at the request of an indigent defendant to issue subpœnas at government expense to witnesses located anywhere in the United States, instead of only to witnesses within the court district or within 100 miles of the place of trial. Rule 21 provides that the defendant, for the first time in Federal practice, may have the proceedings transferred to another district if the court is satisfied that local prejudice may prevent an impartial trial.

As was to be expected the Advisory Committee encountered difficulties arising from the varying conditions prevailing in the different judicial districts.

A rule suitable for a metropolitan area such as New York, where judges are in continuous session, might be quite unworkable in a rural district where the judge appears only for a few weeks in the year. In consequence the new Rules are not concerned so much with the minutiæ of practice as with general principles. In many respects the Rules merely outline the procedure to be applied uniformly throughout the Federal judicial system, and it is left to the district courts to supplement these general rules by local rules which give scope to local tradition and usage and also to judicial discretion. Rule 57 provides that such local rules must not be inconsistent with the Federal Rules. In discussing the place of local rules in the new framework Judge Holtzoff observes that it was not the desire of the Advisory Committee to encourage the multiplication of detailed local rules as happened in some districts after the Federal Rules of Civil Procedure came into effect. It will be interesting to learn how far the hope that these local rules will be restricted to what is strictly necessary will be realised. The Federal Rules are silent on a number of important topics. The variations in practice prevailing in the different districts are as great as those which distinguish English from Scottish criminal procedure. In Scotland, for example, counsel for the accused always has the last word. In the United States the order of argument of counsel varies in different districts. Again, in some districts, such as the District of Columbia, there is a rule that during a criminal trial every witness is excluded from the court-room until he gives evidence. Most lawyers will endorse Judge Holtzoff's recommendation that this rule should be universally adopted. Clearly the Federal Rules leave matters of substantial importance within the province of the local rule-makers.

The volume under review contains an annotated edition of the new Rules, but for the greater part it consists of a transcript of the proceedings of an Institute held in New York City in February, 1946, at which the Rules were discussed by a representative gathering of distinguished lawyers. The views expressed in this symposium form a most illuminating commentary. This is clearly a publication of great importance to the legal profession in the United States. To lawyers on this side of the Atlantic it offers a most readable introduction to the American system of criminal procedure.

J. AIKMAN SMITH.

RELATIONS BETWEEN THE FEDERAL AND STATE COURTS. By MITCHELL WENDELL, PH.D. [New York : Columbia University Press; London : Geoffrey Cumberlege. 1949. 298 pp. 32s.]

THIS monograph examines some of the problems created by the existence in the United States of two distinct but convergent systems of judicature. Each State has its own laws and its own hierarchy of courts, but the lower federal courts (the federal District Courts and Circuit Courts of Appeals) also exercise jurisdiction in certain classes of cases that are deemed to have a more than local import. Often a litigant is able to choose whether to proceed in the federal or the State courts. If he opts for the federal courts, are those courts to apply the laws of a State (and, if so, which State?) or are they to apply the principles of a 'federal common law'? The author shows how earlier attempts to avoid applying State rules proved largely ineffective, and how since 1938 State law has been applied in an increasing number of cases in the federal courts. This recent trend away from uniform laws in the United States will be of interest to comparative lawyers. Otherwise there is little in the book that will have meaning for lawyers fortunate enough to live in a unitary State. There is, however, much useful material for students of federal government and, particularly, for citizens of new federal States, like India, which may have to face similar problems.

One last point is recorded without comment. This work is the 555th volume in the series of Studies in History, Economics and Public Law edited by the Faculty of Political Science of Columbia University.

S. A. de Smith.

Sistema Y Filosofia Del Derecho Internacional Privado. By Werner Goldschmidt. 2 vols. [Barcelona : Bosch. 1948 and 1949. 311 and 576 pp.]

Dr. Goldschmidt is a comparative lawyer of experience. First trained in Germany, he has for many years practised in Spain as a Spanish advocate, and two years ago accepted an invitation to become visiting professor in the National University of Tucuman. His published work in this most recent period [1] bears eloquent testimony to his familiarity with those systems based generally on the Spanish civil law. Against such a background Dr. Goldschmidt has produced his System and Philosophy of Private International Law with special reference to Spanish Private International Law.

This work, more theoretical than most Spanish writings on Private International Law, is substantially a rationalisation of the Spanish system. Around this nucleus it contains many useful and enlightening contrasts with the corresponding branch of German law, with less frequent but well-informed references to the Anglo-Saxon systems. It is gratifying to find that Dr. Goldschmidt does not share the general contempt of his German and Spanish colleagues for the pragmatism of the common law [2]; on the other hand, his familiarity with recent English contributions in this field is greatly assisting in convincing Continental lawyers that the English are not entirely bereft of the power of original and constructive thought.[3]

This work follows the normal pattern of all life in its threefold division.

In the first part the author examines the history and theories of private international law, together with its objects and methods: in the second, under the general heading of The Norm of Private International Law in General, he considers questions of classification, and the connecting factor. In this section the author's short treatment of public order, the 'caballo desbocado', is particularly interesting.[4] Volume II, comprising the third part of the work, treats of the individual rules of private international law, with a valuable excursus [5] on private international criminal law.

For an English lawyer this approach to a general theory of private international law from the aspect of Spanish law is original and refreshing. The ordinary practitioner is not entirely to blame if his outlook, though as wide as it needs to be, is narrower than it should be. But the lawyer concerned with international transactions can never find a common plane of understanding with his Continental colleagues unless each first learns to understand, if not to speak, the other's legal language. Professor Goldschmidt's two volumes will greatly assist in the growth of this understanding. It is greatly to be hoped that the mechanical barrier of language may be surmounted and a translation into English of this important work open for common lawyers the way to a broader view of law.

R. H. Graveson.

[1] *E.g.*, 'Conceptos Fundamentales del Derecho Internacional Privado', 1 Revista del Instituto de Derecho Civil, No. 3, p. 57.
[2] Vol. I, p. 14.
[3] See, for example, his stimulating treatment of *Re the Duke of Wellington, decd.* [1947] Ch. 506, in Zeitschrift für Ausländisches und Internationales Privatrecht, 1949, 2, pp. 342–350.
[4] Vol. I, pp. 274–286.
[5] Vol. II, pp. 409 ff.

THE LAW OF QUASI-CONTRACTS. By JOHN H. MUNKMAN, LL.B., of the Middle Temple, Barrister-at-Law. [London: Sir Isaac Pitman and Sons, Ltd. 1950. xiv and 102 pp. (and index 2 pp.). 20s. net.]

QUASI-CONTRACT is a large subject and whilst much has been written on its various aspects, some adequate textbook has been required for a considerable time. It is this that makes the publication of this book so noteworthy.

From the very nature of law it is natural to assume that in most systems there must exist a doctrine whereby one person may not wrongly enrich himself at the expense of another, and lawyers have recognised for a very long time that outside the sphere of contract and tort there exists a further body of law which provides a remedy in such circumstances. It is a little surprising therefore to see that Mr. Munkman states in the preface to his work that quasi-contract is virtually a new subject.

I would have preferred the title of the book to have been something other than 'The Law of Quasi-Contracts', especially as Mr. Munkman has included an account of all aspects of this subject. Moreover it is hoped that before long this topic will be taught as a separate subject, not leaving part of it to be dealt with under the heading of 'Contract' and part under the heading of 'Equity'. Very recently Denning J., as he then was, indicated the true position today in the case of *Nelson* v. *Larholt*, [1947] 2 All E.R. 751, when he said, 'It is no longer appropriate, however, to draw a distinction between law and equity. Principles have to be stated in the light of their combined effect . . . . The right here is not peculiar to equity, contract or tort, but falls naturally within the important category of cases where the Court orders restitution if the justice of the case so requires'. It is mainly for this reason that 'The Law of Restitution' would have been a better title, and would have been following the American example. Mr. Munkman may have been guided in his choice, however, by his declared intention of catering for the practitioner where tradition dies hard.

The book is divided into four parts. The first chapter is headed 'General Principles', and contains a general introduction, a reference to some of the definitions of quasi-contract, a brief mention of the theoretical basis of quasi-contractual liability, a short historical survey and mention of the relationship of quasi-contract with other branches of the law. The second part of the book Mr. Munkman heads 'Restitution', which is concerned with such topics as the recovery of money paid under a mistake of fact, or as the result of fraud, duress, quasi-duress and undue influence, recovery of money for a consideration which has wholly failed, tracing orders in equity and the liability of an agent and the holder of an office to account, etc., and an account of following assets in equity. The third part deals with cases of what Mr. Munkman terms 'Reimbursement' and contains reference to cases involving the payment of the defendant's debt under compulsion, the right of indemnity of sureties, contribution and subrogation. The fourth part is headed 'Cases of Recompense', and deals with such varied topics as *quantum meruit* claims, maritime salvage and improvements to land. There is a final chapter in which Mr. Munkman deals very briefly with the practice and procedure of a claim in quasi-contract.

Mr. Munkman, although giving us a clear account of the various types of quasi-contract, has possibly over-classified the subject. Moreover it would certainly have been wiser to have relegated any reasoned discussion of the basis of the liability to the end of the book, and from the point of view of the student it would have been better had Mr. Munkman discussed this topic at much greater length. In this connection he does not seem to accept the principle of unjust enrichment and yet he has taken the opportunity of mentioning practically all instances where this principle is to be found, even

though such cases could never be considered as examples of pure quasi-contract, *e.g.*, Compensation Under the Landlord and Tenant Act, 1927, and the Agricultural Holdings Act.

Mr. Munkman has made reference to most of the leading articles on this subject, but in view of the fact that the book is primarily intended for practitioners, one would have expected the reference to a larger number of cases. In particular, mention of the decision of *Britain* v. *Rossiter* (1882) 11 Q.B.D. 123 under the heading, 'Benefits Conferred Under An Ineffective Contract' and a reference to the early case of *Brown* v. *Litton* (1711) 1 P. Wms. 140 when dealing with the question of *negotiorum gestio* might have been included, and the treatment of *Re Cleadon Trust, Limited,* [1939] Ch. 286 should have been more elaborate, so as to clarify the position.

I have noted two errors in the text, one on page four where in describing the 'Writ of Debt' Mr. Munkman says, 'It was initially an action to vindicate a right of property by claiming a sum of money in the hands of the Defendant on the ground that it rightfully belonged to the Defendant' —the last word should, quite obviously, be 'Plaintiff'. Again, on page thirty-six, where he says, 'It is settled law that to support a gift from solicitor to client, independent professional advice must be obtained'—should quite obviously read, 'It is settled law that to support a gift from client to solicitor . . .'.

In spite of any shortcomings it is felt that the book will be of assistance to the student for, on the whole, it gives a clear, if possibly over-classified, account of the law, but it is unlikely to be widely used by practitioners.

D. S. ADAMS.

BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS. Tenth Edition. By HIS HONOUR JUDGE KIRKHOUSE JENKINS, K.C. [London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1950. clxxxiv and 973 pp. £5 net.]

'WITHOUT the use of precedents it is almost impossible, particularly in pleadings of a complicated nature, for any one but an accurate lawyer and experienced draftsman to avoid overlooking some points of a case absolutely essential to the maintenance of the right or defence. This was never more apparent than it has been in some of the specimens of pleadings which have been met with since the recent changes in the law, drawn by unpractised hands without precedent or guide'. Ninety years after these words were written, in the authors' preface to the first edition of *Bullen and Leake,* few pleaders, whether the 'unpractised hands' or the 'experienced draftsmen', would not be prepared to echo the sentiment and acknowledge their indebtedness to the precedent book. Now after fourteen years this classic appears in a new edition. In the majority of legal textbooks an accumulation of fourteen years of legislation and judicial decision would necessitate drastic revision. But since the principles of factual pleading are scarcely susceptible of change and the basic elements of causes of action and defence change but little, it is rather in the copious notes than in the precedents themselves that the learned editor's assiduous industry in bringing the work up to date is to be detected. But this is not to suggest that a new edition was not overdue. For indeed it is in the notes that as much of the value of the work lies as in the precedents. But the most difficult task confronting the editor is to keep the notes—in scope scarcely less than a miniature *Halsbury*—from growing to proportions where they swamp the text to which they are appended.

Errors in pleading no longer carry with them the grave consequences which once they did, and if in these days it is still not uncommon for

pleaders to 'overlook some points of a case absolutely essential to the maintenance of the right or defence', it is no doubt to this want of discipline that their failures should be attributed, rather than to any shortcomings in the work which has guided generations of practitioners.

N. C. B.

PHIPSON'S MANUAL OF THE LAW OF EVIDENCE FOR THE USE OF STUDENTS. Seventh Edition. By SIR ROLAND BURROWS, K.C. [London : Sweet & Maxwell, Ltd. 1950. xxiv and 307 pp. £1 2s. 6d.]

*Phipson's Manual* makes its first post-war appearance in slightly larger format which involves a reduction in the number of pages. Unfortunately, the price still keeps going up and that is a serious matter with a students' textbook.

When a work has become so permanently and justifiably established as an unrivalled introduction for beginners as the little *Phipson*, and is so distinguished for clarity of exposition and for the wealth of detail provided, it is both presumptuous and rather late in the day to offer, however tentatively, certain general criticisms of the work as it now stands. A review of a new edition of the *Manual* is in any case hardly the place to challenge the time-honoured juxtaposition of examples of admissible and inadmissible evidence which is, after all, derived from the big textbook. It must, therefore, suffice to say that this reviewer is inclined to think that, however useful in certain respects, this arrangement tends to give a debatable impression of the subject matter as a whole. It seems to be based on the belief that the Law of Evidence is nothing much more than a collection of rules, many of them negative, determining *a priori* the facts which are, and those which are not, admissible in a Court of Law, a view firmly held by so great a lawyer as the late Sir James Stephens. There is, however, another opinion which regards as admissible and open to the free evaluation of the Court all evidence which has probative value, unless excluded by specific rule of law, and it is by no means settled yet which of these two views will eventually prevail.

Moreover one cannot altogether avoid the impression that, given the fact that the *Manual* is a beginner's book and that there is always the big *Phipson* to fall back upon, the author and the present learned editor have leant rather to over-generosity in the number of cases cited as examples or in footnotes. Thus there appears (in a footnote on p. 150) a block of a round dozen cases in support of the simple proposition that a certificate of a Secretary of State is conclusive evidence as to matters wholly within the Royal Prerogative. The examples set out more fully in the text—not a few of them, in any case, mere *obiter dicta*—include quite a number of older decisions which would hardly now be followed and the arrangement adopted must lead, occasionally, to the attempt to reconcile the irreconcilable. In this connection it strikes one as something of an understatement to say (on p. 174) that the judgment of the Court of Appeal in *Hollington* v. *Hewthorn* 'throws doubt' on *Re Crippen*, decided, it is true, by the same court. Nor is it quite easy to see why the editor should have seen fit to retain cases like *Manley* v. *Shaw* which decided, in 1840, that a juryman, though sworn in the jury-box, may give evidence as a witness and yet remain on the jury (p. 192), or *Waldridge* v. *Kennison* (on p. 90), both authorities which he himself considers obsolete. Another case in point which cuts an odd figure is *R.* v. *Rosier* (on p. 108–9), but examples of decisions founded on special sets of circumstances which could hardly now recur, yet provide no clue to valid general principles might, it is believed, be multiplied.

The increasing importance of legislation for this branch of the law

is shown by the fact that more than twenty new Statutes have been incorporated into the text since the appearance of the last edition, including, of course, the Criminal Justice Act, 1948, and the statutory reversal of the rule in *Russell* v. *Russell*. Of new decisions there is only one, *R.* v. *Sims*, which has received what many may regard as less than adequate treatment: it is mentioned only incidentally to say that the Privy Council, in *Noor*, expressed its disapproval of certain general statements there laid down, but what these may have been or indeed what this important decision of the Court of Criminal Appeal was about cannot be gathered here.

Only one serious misprint was encountered: a word has obviously dropped out of footnote 39 on p. 229. The book is well printed and produced, but it is a somewhat novel experience to this reviewer to find that the sheets (of his copy at least) are composed of two entirely different kinds of paper, one much thicker than the other.

H. A. Hammelmann.

Underhill's Law of Torts. Sixteenth Edition. By Ralph Sutton, m.a., one of His Majesty's Counsel, a Bencher of Lincoln's Inn, and Barry Sheen, m.a., of the Middle Temple and the South-Eastern Circuit, Barrister-at-Law. [London: Butterworth & Co. (Publishers), Ltd. ci and 412 pp. (with index). 25s. net.]

The changes in the law effected by Statute since the last edition of this work appeared in 1946 have been dealt with most faithfully. In particular the chapter relating to common employment, the Employers' Liability Act, 1880, and the Workmen's Compensation Acts, which appeared in earlier editions, has been entirely omitted, and its place filled by an additional Article [72] which covers the subject of the duty of masters to their servants entirely adequately for a work of this type.

It is to be hoped that the return to *Stephens' Commentaries* as the prescribed book for the Law Society's Intermediate Examination will not unduly affect the popularity of *Underhill*. The edition under review retains, as was inevitable, the treatment of the subject by the statement of general rules at the head of each Article, followed by an 'Explanation' which examines the substance of the heading in detail. This method, as has frequently been admitted, has its dangers, particularly for students, but these are perhaps outweighed by the advantage of the immediate direction of the mind of the reader to the basic principles of the particular subject under consideration.

A number of new decisions are dealt with in this new edition and in those instances where the cases are summarised for use as 'illustrations' the summaries are excellent, as was to be expected.

In short, the learned editors have achieved an adequate revision, without altering the character of Sir Arthur Underhill's treatise, which purports to be 'A Summary of the Law of Torts'. The achievement is no mean one.

S. H. Bate.

Learning the Law. By Glanville L. Williams, ll.d., Professor of Public Law in the University of London. [London: Stevens & Sons, Ltd. xiv and 192 pp. 12s. 6d. net.]

This is the third edition of an admirable book. It contains a new chapter on General Reading, expected by the author 'to provide good hunting for the critics'. This critic's horse, after a brisk mental gallop, ran the chapter

to earth in a thicket of zeal for imparting information. At present law teachers are being much urged to reform. They are told that the law student should be aware of economics, politics, sociology, psychology: more, that he should be given instruction in them as part of his legal education. All this seems to be based on the fundamental assumption that what is not taught is not learnt, that what is not pointed out is not read. There could be no more damning and unjustified indictment of undergraduate life. What is needed is not so much an extra spoonful of information as a periodic dose of mental fruitsalts.

In the rest of the book there is little novelty, but there is excellent commonsense advice throughout. It has been a pleasure to re-read it. Yet here a problem is raised. Who is to read this book? The introductory chapters on the Divisions of the Law, Common Law and Equity, the Mechanism of Scholarship and Technical Terms are suited to the beginner; Chapters 6 to 10 to the man who knows some law; Chapters 11 and 12 primarily to the postgraduate in search of a higher truth or income. The book is not only a guide for the beginner, but also a goad for the leisurely ('those that seek me early shall find me'), and a stick for those overcome by feigned weariness ('no time to finish'). This is said in no critical spirit, but rather to stress that only if the student can be persuaded to return to a book that was at first 'too much for him' will he profit in full from its wisdom and clarity.

G. D. G. HALL.

LAW AND CONDUCT OF THE LEGAL PROFESSION IN NEW SOUTH WALES. By R. C. TEECE, M.A., LL.B., K.C. (New South Wales), President of the New South Wales Bar Association, 1936 1947, Lecturer in Legal Ethics and sometime Dean of the Faculty of Law, University of Sydney, and W. N. HARRISON, B.A., LL.M., Barrister-at-Law, Garrick Professor of Law in the University of Queensland. [Australia: The Law Book Co. of Australasia Pty Ltd., Sydney, Melbourne, Brisbane. 1949. viii and 103 pp. 15s.]

MR. TEECE and Professor Harrison have produced a work which will, no doubt, be read with the greatest profit by every lawyer in New South Wales, but which deserves the attention of all those interested in the structure and working of the legal profession elsewhere. The New South Wales Bar is organised on lines following remarkably closely the example of the English Bar. The legal profession is divided into barristers and solicitors, the division being similar to that in use in this country. There are, however, some remarkable differences. In New South Wales it is a regular practice for counsel to interview witnesses, and the learned authors say that 'there seems to be no reason so far as the public interest is concerned, why counsel should not share with the solicitor such responsibility for the evidence as in England falls on the solicitor alone'. This is an instance of a remarkable divergence also from the views held by many Continental professional bodies in whose view an attorney (including a solicitor) should on no account interview witnesses or experts. On the other hand barristers, as well as solicitors, are treated as officers of the Court, the Supreme Court exercising a power to suspend from practice or to disbar. Solicitors in New South Wales are permitted to allow an agency fee not exceeding one third of the profit costs to solicitors in other parts of the Commonwealth of Australia and even to foreign solicitors. Transition from one branch of the profession to the other is made easier than in this country, every member of the Bar of five years' standing being entitled to be admitted as a solicitor upon being on his own

application disbarred, a similar provision providing for admission to the Bar of solicitors of five years' standing. Solicitors have the right of audience in all courts and in all matters in which they are employed as attorneys. These examples may be sufficient to give an indication of the wealth of important and interesting problems treated in this book. But it is necessary to add that the authors' merit consists not merely in having assembled and marshalled this material in a most satisfactory manner. They have succeeded in making this book one of the most readable of all works on legal etiquette. A wealth of interesting examples, lucidity of exposition, due insistence on the moral aspects of legal etiquette and last, not least, a most skilful selection from authoritative decisions and writings (including even those of Dr. Samuel Johnson) raise this book high above the common level of legal textbooks and of 'guides' to the legal profession.

E. J. Cohn.

Patriarcha. By Sir Robert Filmer. Edited by P. Laslett. [Oxford : Blackwell. 1949. 326 pp. 12s. 6d.]

At a time when much is being said and written about the right of man to choose his form of government and to participate in that government, it is somewhat refreshing—as well as amusing—to read a text that is a complete antithesis to all such opinions, even if it is in itself just as much an ideology as the modern worship of human rights.

Sir Robert Filmer was a Kentish Royalist who lived from 1588 to 1653, and whose contribution to the Royalist cause was made solely by his pen. He was an ardent supporter of the prerogative and of the divine right of kings—he even believed that the European kings of his time claimed their title by direct descent from Adam, Noah having divided the Mediterranean world and its peoples between his three sons—and his chief significance lies perhaps in the fact that his writings were largely responsible for Locke's *Treatises on Government,* which were intended as a riposte.

Of topical interest is his attitude towards the problem of superior orders. Since the king was supreme and absolute, it was not for any subject to question the legality of his orders or to disobey them, any more than it was the right of a son to question his father, or a servant his master. He even considers a usurper to be entitled to obedience. It would have been interesting, therefore, to have been able to read his comments, not merely on the trial of the regicides, but on that of Axtell (1661) who had commanded the guard at the execution. Axtell had pleaded that he had merely carried out the orders of his superior. It was held, however, that when the 'command is traitorous the obedience to that command is also traitorous' (Kelyng 13). Filmer, in support of the absolute power of the King, had argued that it was not for a mere soldier to question whether a war was just or unjust. Perhaps this is merely an example of the selectivity that is often employed by partisans in order to prove their case.

Filmer, of course, was a bitter critic of Hobbes' conception of the state of nature, and his reply to Hobbes' concept of permanent war might almost have come from the pen of Lord Boyd-Orr: 'if such a multitude of men should be created as the earth could not well nourish, there might be cause for men to destroy one another rather than perish for want of food; but God was no such niggard in the creation, and there being plenty of sustenance and room for all men, there is no cause or use of war till men be hindered in the preservation of life, so that there is no absolute necessity of war in the state of pure nature; it is the right of nature for every man to live in peace, that so he may tend the preservation of his life, which

whilst he is in actual war he cannot do. . . . If every man tend the right of preserving life, which may be done in peace, there is no cause of war'.

*London.* L. C. Green.

Beiträge zum Zivilprozessrecht. Festgabe zum 70. Geburtstage von Leo Rosenberg. [München und Berlin: C. H. Beck'sche Verlagsbuchhandlung. 1949. 274 pp. 15 DM.]

Lord Chorley has recently in this Review suggested that civil procedure is a topic capable of, and in fact, requiring scientific treatment. On the Continent of Europe this view has been adopted for many centuries. A flourishing science of civil procedure has accompanied, followed, and sometimes even led the practice of the courts. In Germany Professor Leo Rosenberg of the University of Munich is one of the most eminent protagonists of that science. His textbook of the German law of civil procedure has for long been indispensable to any serious student of that branch of German law. Many decisions of German courts bear striking witness to the influence which it has had on the interpretation of the law by the courts. Professor Rosenberg's voice was silenced during the period of the Nazi regime, but since 1945 he has been reinstated and the present volume testifies to the high esteem in which he is held by his colleagues in other German universities, whose contributions are included in this Festschrift. Three of these contributions are of considerable interest to foreign readers: Professor Blomeyer deals with problems of the law of arbitration on a comparative basis, Professor Riezler, who recently published a most important treatise on the law of conflict of laws in the field of civil procedure, deals with the problem of the lack of international jurisdiction, and Professor Süss contributes a very learned study on the recognition of foreign judgments. German law grants recognition to foreign judgments only if reciprocity of treatment in favour of German judgments is granted by the foreign country in question. Professor Süss in a penetrating analysis shows convincingly that this principle cannot be justified by grounds of equity, logic or convenience. This article is a significant example for the contribution which the science of the law of civil procedure can make to the development of this part of the legal system, even where that development is predominantly in the hands of the legislator and not in those of the courts.

E. J. Cohn.

The Trial of German Major War Criminals. Proceedings of the International Military Tribunal, sitting at Nuremberg, Germany. [London: H.M.S.O., Part 18, 401 pp., 7s.; Part 19, 482 pp., 8s.; Part 20, 409 pp., 7s.; Part 21, 347 pp., 6s.]

The four volumes of the Nuremberg Proceedings now under review cover the period from July 2 to August 21, 1946. During this period the Tribunal concluded its hearings of the cases for and against the individual defendants, and commenced the hearing of the case against the indicted organisations.

In delivering its sentence on Doenitz, the Tribunal stated that 'in view of . . . the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare'. In Part 18 of the Proceedings the statement made by Admiral Nimitz is reproduced. In this it is made quite clear that the United States was not prepared to wait for the Japanese navy to show its hand before ordering the indiscriminate destruction of Japanese shipping. The United States order even applied to fishing boats, which are normally

exempt from maritime warfare, and rendered it unnecessary for the United States Navy ever to resort to reprisals in connection with the naval war against Japan.

In the indictment of the Nuremberg Trials contained in his *Politics, Trials and Errors,* Lord Hankey has complained that the Tribunal did not pay attention to the significance of the Treaty of Versailles in the rise of Nazism. During his defence of Hess, Dr. Seidl wished to deal with this matter. His references to the Fourteen Points were, however, ruled out as irrelevant, and although the prosecution had submitted the Treaty as evidence, all his attempts to impugn its legality or justice were prevented.

Where most of the defendants were concerned, there is little of value from the legal point of view in all the contentions put forward by their counsel. The whole defence boiled down to a plea of ignorance or superior orders. As regards the former, the evidence showed this to be completely without foundation, while the Nuremberg Charter expressly forbade the Tribunal to admit the validity of superior orders as a defence. There has been much comment in apologist and sentimental circles on the validity of this ruling, and it has been suggested that before 1945—or at least before the amendment of the *Manual of Military Law* in 1944—superior orders constituted a legitimate defence even to war crimes involving the death of the victim. Such apologists forget that as early as 1474 an international tribunal refused to recognise this plea, that in *Axtell's Case* it was not accepted by an English tribunal, and that, in any case, the *Manual* has never purported to be a correct and binding exposition of the law. It has merely served as a guide for military officers and has no more authoritative character than any textbook.

In so far as the concluding speeches against the individual defendants are concerned; there is little need to say very much, for these speeches were first published in a separate volume in 1946. Their chief significance today is to remind the sentimentalists in the Western world of the character of the Nazi crimes. They should be compulsory reading for those persons who believe that the German army and its Nazi colleagues are so vital to the defence of Democracy that an immediate amnesty for war criminals is essential. When these people allege that the poor unfortunate war criminals did not know their actions were illegal, they should be reminded of the point made by General Rudenko in replying to the main legal defence arguments: 'The law of all civilised countries provides criminal responsibility for murder, torture, violence, plunder, etc. The fact that these crimes have been initiated by the defendants on a scale surpassing all human imagination . . . does not, of course, exclude, but, on the contrary, increases many times over, the responsibility of the defendants'.

Perhaps the most unfair criticism of the Nuremberg Trial is of its duration. In view of the number of the defendants, of the documents admitted for both the prosecution and the defence, and the widespread character of the crimes with which the accused were charged, any shorter trial would of necessity have been rushed and unfair to the defendants. Those who now criticise the length of the Nuremberg Trial would then have been even more verbose in condemning its brevity and undue, almost indecent, haste. It is unfortunate, however, that those responsible for the publication of the proceedings have not seen fit to complete the published version in the four years that have elapsed since the termination of the trial, and that they have not prepared an abbreviated version intended for the general public. The horrors of the Nazi concentration camps and methods of warfare were such that people should be given no opportunity to forget them. In the absence of such reminders, is it any wonder that sentimental half-truths and white-washings are accepted without contradiction? In the case of the Tokyo Trial the situation is even worse, for as yet no version of the proceedings or the judgment has been made available in Great Britain.

*London.* L. C. Green.

History of the United Nations War Crimes Commission. Compiled by the United Nations War Crimes Commission. [London: His Majesty's Stationery Office. 1948. xx and 592 pp. 30s.]

After the Allied nations declared their intention to seek out and punish with the utmost rigour of the law the Axis war criminals, it soon became clear that they had committed themselves to an immense task. If this greatest detective story of all time was to reach a successful conclusion, it was essential that a special body be established to list the alleged criminals and act as a clearing house and central office for the co-ordination of effort in the tracing, apprehension and punishment of the criminals. In order to fulfil this task the United Nations War Crimes Commission was established. Some idea of the immensity of the task undertaken by the Commission can be gathered from the fact that by early 1948 the Commission had listed some 36,000 persons as potential war criminals against whom there was a *prima facie* case.

This volume gives a detailed account of the establishment of the Commission and the discussions that took place within it, leading to the arraignment of the Nuremberg criminals and of all those who, both in Europe and the Far East, have been described as the minor war criminals. This record makes it quite clear that difficulties in the way of Soviet-Western co-operation are not of recent date, for the Soviet Union refused to participate in the work of the Commission, despite the fact that the other members of the Commission did not hesitate to try Germans for war crimes against Soviet troops and civilians.

Apart from the history of the Commission itself, the volume contains an account of the development of the laws of war. It is in this account that one comes across a number of points that ought not to be taken at their face value. This volume repeats the assertion that the rules of war prescribed in the *Manual of Military Law* constitute international law as applied by municipal courts. In fact the *Manual* is merely a guide for the use of military officers and has no more binding authority than, for example, *Dicey* or *Salmond*. In fact, these rules first appeared in the *Manual* under the heading: 'Land Warfare, an exposition of the laws and usages of war on land *for the guidance of officers* of His Majesty's army by Colonel Edmonds and L. Oppenheim' (italics added).

Since the Nuremberg Tribunal delivered its judgment it has become popular to maintain that the Kellogg Pact not merely declared war illegal, but made it a crime—this, although the whole of the judgment on this point is pure obiter. The present *History* reiterates this assertion time and time again. This is the more surprising as it criticises the Tokyo indictment for alleging that all the deaths resulting from undeclared—and therefore illegal, or even criminal—war constitute murder: 'The novelty consists in qualifying this illegal act as being at the same time a criminal act'.

Lord Wright was Chairman of the United War Crimes Commission at the time this *History* was written, and both he and the various contributors to the volume are convinced that all that was done in connection with the punishment of war criminals was in accordance with existing law, and they constantly settle all argument by referring to the fact that this is in accordance with the judgment of the Nuremberg Tribunal. It is submitted that it is somewhat dangerous to summon in support of a contested argument the decision of a tribunal that can only be correct if the argument is sound. Thus, in his Introductory Chapter, Lord Wright declares that the 'leaders and organisers of the actual war or wars were guilty of the crime of planning and initiating war as an instrument of policy, the crime against peace forbidden by the Kellogg-Briand Pact of 1928 against aggressive war and also condemned by the Nuremberg Judgment'. In the chapter devoted to

the historical survey of the activities of the Commission, it is not the judgment but merely the indictment that is referred to in this way: the view that aggressive war was a crime 'was finally vindicated in the indictment of the Major War Criminals'.

Whatever criticisms one may have of the substantive law embodied in this history, one cannot but admire the work carried out by the United War Crimes Commission. At the time the Allies decided to punish war criminals it was hoped that there would be no need to repeat the experiment. Unfortunately, the war in Korea has shown that this was an empty wish, and if the cold war develops into a shooting war there can be little doubt that war crimes trials will be held either during the war itself or after the cessation of hostilities. This time no aggressor will be able to plead ignorance, and there will be no need for hours to be frittered away in endless discussions of an administrative character. From the point of view of convenience, this *History* will be of great value. From the point of view of substance, however, we can only repeat the closing sentence of the volume: 'Whether the Commission made a significant contribution to the cause of international justice will, like the Allied trials of war criminals, depend upon the verdict of History'.

*London.* L. C. Green.

## Luftrecht. By Otto Riese. [Stuttgart: K. F. Koehler Verlag. 1949. xix and 556 pp.]

This is a comprehensive work on air law written with special reference to Swiss law by a well-known expert who is a professor at the University of Lausanne. It is the work of a scholar and at the same time of an author who, by reason of his membership of the Comité international technique d'experts juridiques aériens, has gathered a great deal of practical experience in a highly specialised field.

In the first part the author deals with general questions of air law such as sources, unification and the international regulation of the control over the air. The second part is devoted to specific matters of public and private law of the air. Here the main headings are: the aeroplane as a chattel, liability towards third persons, law of air transport, salvage and collision.

Throughout the author proceeds from that broad comparative basis which the subject requires. He does not confine himself to stating the existing law, but also expresses criticism and makes suggestions for reform.

Although tribute must be paid to the diligence with which the author has covered a large field, it must be regretted that he has refrained from giving more precise guidance on some points of importance. Thus, without stating his reasons, he is not in favour of the prevailing Anglo-American practice according to which carriage from a contracting State to a non-contracting State and back to the contracting State by means of a return ticket is international carriage within the meaning of the Warsaw Convention. Similarly, the author's remarks on the crucial conception of 'dol' or 'wilful misconduct' in Article 25 of the Warsaw Convention (at p. 466) are meagre. Nevertheless, the expert of air law who can read German will undoubtedly derive great assistance from this treatise.

F. A. Mann.

## Schweizerisches Jahrbuch für Internationales Recht. Published under the Auspices of the Swiss Association for International Law. Vol. 5. [Zurich: Polygraphischer Verlag. A.G. 1948. 286 pp.]

The fifth volume of this Yearbook maintains in every respect the high level of its predecessors. Professor Max Huber's essay on neutrality and neutral

policy is an admirable statement of the Swiss view on the position of Switzerland in a world in which an open conflict may break out any minute. The peculiar situation of a neutral country whose population finds itself in complete ideological agreement with one of the two parties in conflict is discussed with impressive frankness. Judge Bolla deals with the draft conventions on freedom of information, which unfortunately look like possessing very little practical value. Professor Niederer's article on the relationship between private and public international law deserves the most intensive study. The importance of this article is entirely out of proportion to the small space which it covers. The author discusses the relationship between the nationalist and the universalist view of the nature of the conflict of laws and the bearing of these views on the fundamental questions of private international law. His arguments are distinguished alike by profundity, learning, sound commonsense and an understanding for the contribution of the law of conflict of laws to the formation of an international community, which yet does not suffer from an unrealistic disregard of existing difficulties. Professor Knapp has contributed a study of a number of Swiss decisions which have rejected the unfortunate doctrines according to which the *lex causae* governs the effects of a contract only and not its formation, or under which the obligations of each party are governed by a different law. With characteristic disdain for theoretical over-refinements the Swiss courts now tend to submit all the questions arising from one contract to one law, a simplification which is in every respect desirable and stands in marked contrast to the complexities resulting from the opposite view adopted by the German courts.

Dr. Hagemann's informative article on the accession of Switzerland to the Statute of the International Court is illustrative of some of the difficulties resulting from the Swiss concept of neutrality and thus forms an instructive supplement to Professor Huber's opening essay.

The second part of the volume contains reports on the development of public and private international law from the pen of well-known experts in the various fields. Some of the problems with which Swiss jurists are confronted are highly intriguing. From Professor Guggenheim's report on the development of public international law we learn that the French customs authorities have employed agents provocateurs on Swiss soil in order to induce Swiss nationals to commit contraventions of French customs regulations for which they could be punished when entering French territory. The Swiss Government refused to recognise that the Allied Control Council exercises sovereign power in Germany or that it was a German Government, but maintained--and presumably still maintains--de facto relationship with the occupation authorities, which permit the treatment of urgent problems. On the other hand the Swiss Government does recognise the sovereignty of Soviet Russia over Eastern Prussia and the Baltic States. It is perhaps not too easy to reconcile the latter decision with the former. A circular sent to all Swiss legations and explaining the Swiss policy of neutrality is reprinted in the Appendix to Professor Guggenheim's article. Among the Swiss decisions on private international law which are summarised by Professor Knapp one reads with some astonishment a judgment of the Federal Court refusing to recognise on the ground of Swiss public policy that German Jews residing outside Germany are validly deprived of their German nationality by the Eleventh Ordinance on the Reich Citizenship Law. A comparison of this decision with *The King* v. *The Home Secretary* (1945) proves that public policy is not only an unruly horse, but one which few, if any, riders are able to ride. Decisions on questions of the conflict of laws in the field of the law of contracts and civil procedure are reported and most ably commented on by Professors Gutzwiller and Fritzsche. Dr. Frey's report on the law relating to the clearing arrangements concluded by Switzerland will be found particularly useful by many practitioners. The volume concludes with a report by Professor V. Waldkirch on industrial property. In this field too

the Washington Accord between Switzerland and the Allied Powers has resulted in most undesirable uncertainties and delays, which result from the fact that the multilateral agreements which were to be concluded subsequently to the Washington Agreements have never matured. The Washington Agreements seem to be the result of overstressing the conceptions of the English law relating to trading with the enemy. One may well doubt whether they will in their entirety stand the verdict of legal history.

*London.* Ernst J. Cohn.

Under God and the Law. Papers read to The Thomas More Society of London. Second Series. [Oxford: Basil Blackwell. 1949. 171 pp. 10s. 6d. net.]

This second series of papers read to the Thomas More Society, while it touches on high topics which neither the lawyer nor the jurist can neglect in the present times, is not of such direct legal interest as was the first series. In his introductory essay Mr. Richard O'Sullivan, K.C., recalls once more the Christian Spirit of the Common Law, there are two papers of permanent value on the life and times of Sir Thomas More, and a member of the Society of Jesus is illuminating on the subject of 'Law and Political Power', as such members so often are. The weightiest contribution is that of F. Phillip Hughes on 'The Constitution of the Church'. This is worthy of the attention of every constitutional and comparative lawyer. Speaking of the new code of Canon Law of 1918, he says: 'Already the fruits of this great measure are evident, the unmistakable signs not only that the rule of law is everywhere steadily displacing the bad tradition of personal administration, but signs also of a new general awareness that unless law is studied and appreciated—loved even—in its own right and for its own intrinsic value, it can never be so known as to be administered in the only spirit that makes administration fruitful, and that safeguards administrators from the perennial curse of *libido dominandi*'.

W. H. D. Winder.

Report of the International Law Commission Covering its First Session. [London: His Majesty's Stationery Office. 1949. 10 pp. 9d.]

Ways and Means of Making the Evidence of Customary International Law More Readily Available. [London: His Majesty's Stationery Office. 1949. 114 pp. 3s. 9d.]

The Charter and Judgment of the Nürnberg Tribunal. [London: His Majesty's Stationery Office. 1949. 99 pp. 3s. 9d.]

Historical Survey of the Question of International Criminal Jurisdiction. [London: His Majesty's Stationery Office. 1949. 147 pp. 3s. 9d.]

Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States. [London: His Majesty's Stationery Office. 1949. 228 pp. 7s. 6d.]

According to Article 13, paragraph 1, of the Charter of the United Nations, 'the General Assembly shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification'. At its second session, therefore, the General Assembly established the International Law Commission, whose task is, among other things, to survey the field of international law in order

to select topics for codification, and consider ways of making the evidence of customary international law more readily available by the publication of collections of relevant documents and of decisions of both national and international tribunals. The most valuable materialisation of this programme has been the three volume collection of *Reports of International Arbitral Awards* published by the Secretariat of the United Nations independently of the Commission.

The little pamphlet on *Ways and Means* provides a useful bibliography of the various collections that exist, both official and unofficial, of materials that are expressive of customary international law. Since it is being increasingly realised that the study of international law is an inductive process, it is essential that students—and others—should know where to find their raw materials, and this memorandum gives the details concerning State practice, and international and municipal judicial reports. Finally, the report calls for an increase in such publications and suggests means for co-operation between governments, the Secretariat of the United Nations and independent scholars.

On December 11, 1946, the General Assembly affirmed the principles of international law recognised by the Nuremberg Charter and Judgment, and later directed the International Law Commission to formulate these principles and prepare a draft code of offences against the peace and security of mankind. The memorandum on Nuremberg now under review was prepared by the Secretariat of the United Nations as a guide to the International Law Commission in this task. The Secretary-General has provided a short historical account covering the period between the Moscow Declaration, 1943, and the Nuremberg Judgment, 1946. He has then continued this historical account to explain the attempts made, under the auspices of the General Assembly, to codify the principles of law laid down in the Nuremberg Charter and Judgment. Perhaps the most valuable part of this memorandum is that in which the Secretary-General's staff has broken down the judgment to explain the legal principles involved, and in this connection due attention has been paid not merely to the decision of the court, but also to the contentions and submissions of prosecution and defence.

The Nuremberg and other war crimes trials reawakened interest in the problem of an international criminal court, and after the General Assembly had adopted the Convention on Genocide it invited the International Law Commission to examine the problem of international criminal jurisdiction and the feasibility of establishing an international criminal court. Once again the Secretary-General was instructed to prepare the preliminary material, and the *Historical Survey* is the result. Here there is only a brief discussion of the various proposals made in connection with this matter between 1919 and the establishment of the United Nations. This section is followed by a slightly longer account of the activities of the United Nations, particularly in so far as genocide is concerned. The last 100 pages of this 147 page memorandum are devoted to the reproduction of relevant documents from 1919 to 1947, and here perhaps is its greatest value.

The post-1945 world seems to be declaration mad. There have been declarations or draft declarations on the rights of man, on the rights of children, old persons, women, and even a draft convention on the declaration of death of missing persons. In an age when praises are sung in honour of the personality of the individual, it is perhaps not surprising that States, too, are concerned about their rights and duties. The *Preparatory Study* is the Secretariat's attempt to prepare a comprehensive statement of what are thought to be the rights and duties of States, for the consideration of the International Law Commission in preparing its final draft declaration. This study was based on the draft prepared by Panama, and therefore gives expression to many of the fears and aspirations experienced by small States, particularly those in Latin America, and there is much reference to the

right to national existence, recognition, independence, non-intervention, exclusive jurisdiction and the like. The fate of this draft in the International Law Commission itself is symptomatic of the fate of any proposals which are intended to protect the rights of smaller States in a world in which international law is, unfortunately, too frequently the handmaiden of power politics.

The main value of these United Nations publications lies in the fact that they bring together the relevant material on many matters which are interesting, if not important, and may well encourage students to pursue these and similar topics of international law to a conclusion that really may contribute to the development of international law.

*London.* L. C. Green.

The Office and Duties of the Director of Public Prosecutions. By Sir Theobald Mathew, K.B.E., M.C. [University of London: The Athlone Press. 1950. 16 pp. 1s. 6d.]

Those who are afraid lest we may already be well on the way towards the police State, will find most attractive and at the same time convincing reassurance in this lecture held earlier in the year at London University. For here the present Director of Public Prosecutions—the nearest thing we have to a 'Procureur General'—in explaining the duties and status of his important office, charmingly disclaims his own high-sounding title and is at pains to emphasise that it is really a misnomer, implying powers which he neither yields nor wishes to yield. Sir Theobald maintains that, in contrast to almost all foreign countries, prosecutions for criminal offences in England are still not public prosecutions 'in the ordinary sense'. After a valuable survey of the ancient tradition of private prosecutions, he expresses the view that even today 'the enforcement of law and order remains in the hands of the private citizen, acting either personally or through the local community of which he is a member. Both the director and the police are, in effect, private citizens paid by their fellow citizens to carry out these duties on their behalf'.

This is no mere fiction. It is true that it is now customary for the police to instigate all prosecutions for serious offences and that private prosecutions are becoming increasingly rare. The police, however, cannot be regarded as official representatives of the Crown, and their powers are almost as strictly circumscribed as those of the ordinary citizen, not least by the threat of actions for wrongful arrest and false imprisonment. The director adds with obvious approval and satisfaction that even he himself, when responsible for prosecutions in cases of outstanding importance or difficulty, does not enjoy immunity from actions for malicious prosecution. His office is a fairly recent one, created by statute. But it is imbued by the spirit of the Common Law, and so long as pride in this tradition survives there is hope for the preservation of individual liberty.

H. A. Hammelmann.

The British Journal of Delinquency. Vol. I. No. 1. July, 1950. [London: Institute for the Study and Treatment of Delinquency. Annual subscription 27s. 6d. post free, single copies 7s. 6d. net.]

We are glad to welcome this newcomer to the ranks of learned periodicals. The science of criminology has not until recent years made much progress in this country, despite the fact that from time to time work of outstanding importance has been accomplished. Of late, however, much progress has

been made, and the lack of an organ in which workers in this field could make their researches known has been evident for some time. It is good therefore that the Institute for the Study and Treatment of Delinquency has been able to sponsor a new journal.

The distinguished editorial board consists of Dr. Edward Glover, Dr. Hermann Mannheim, and Dr. Emanuel Miller, and the first number consists of articles covering a wide range of interest, and augurs well for the future of the periodical.

C.

PLANNING AND COMPENSATION REPORTS. Edited by JOHN BURKE, Barrister-at-Law. Part I. [London : Sweet & Maxwell, Ltd. 1950 : £1 15s. per volume post free.]

WE also draw attention to the appearance of this new series of reports. The rapid development of planning law, and the consequent increasing importance of compensation problems entirely justifies a new series, and since the intention is to cover not only the decisions of the courts, but the in some ways even more important planning appeal decisions given by the Minister of Town and Country Planning, and also proceedings before magistrates, these reports will be invaluable not only to legal practitioners, but to planning officers, chairmen of planning committees, and other persons interested in the subject. This number contains full reports of the more important cases on planning, and compensation, and shorter notes on cases into which planning points have come incidentally.

C.

INTERNATIONAL MONETARY FUND. Annual Report of the Executive Directors for the Fiscal Year ended April 30th, 1949. [Washington, U.S.A. 112 pp. Appendices. Index.]

THIS report contains among others brief and informative reviews of the International Payments Problem, Exchange Restrictions, Exchange and Gold Policies, and financial statistics.

I. G. J.

SLATER'S MERCANTILE LAW. 12th Edition. By R. W. HOLLAND and R. H. CODE HOLLAND, Barristers-at-Law. [London : Sir Isaac Pitman & Sons, Ltd. 1950. xliv and 654 pp. 15s. net.]

THE chief changes in this well-known textbook are those made necessary by the Limitation Act, 1939, the Prevention of Fraud (Investment) Act, 1939, the Law Reform (Frustrated Contracts) Act, 1943, the Transport Act, 1947, and the Companies Act, 1948. It is remarkably good value at its extremely low price.

THE EXPORT TRADE. Second edition. By CLIVE M. SCHMITTHOFF, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1950. xxxii and 393 pp. 25s. net.]

A VERY hearty welcome was accorded to this invaluable book when it first appeared only two years ago (12 M.L.R. 128). The new edition, which has

been thoroughly revised and brought up to date, will enhance the reputation which it has already won.

Annual Review of United Nations Affairs, 1949. Edited by Clyde Eagleton, Director of the Graduate Programme of Studies in United Nations and World Affairs, New York University. New York University Press. [London, Cambridge, O.U.P. 1950. 312 pp. Index. $5.00.]

In 1949 an Institute was established by New York University, an Institute for Annual Review of United Nations and World Affairs as part of the programme of the graduate studies in that field. This book publishes the proceedings of that Institute. Its value is enhanced by the fact that the lectures were given either by permanent officials of the U.N. Secretariat in each department or by persons intimately connected with the work of the organisation. Throughout, a balance is maintained between excessive optimism and a fatalistic pessimism. No attempt is made to conceal the difficulty and gravity of the problems faced by the organisation. No serious student of the United Nations Organisation can afford to ignore this book.

Ieuan G. John.

Pollock's Principles of Contract. 13th Edition. By Sir Percy H. Winfield, K.C. [London : Stevens & Sons, Ltd. 1950. xliv and 610 pp. 40s. net.]

The last edition of this classic work, also edited by Sir Percy Winfield, was fully reviewed by Mr. P. A. Landon in volume 10 of this *Review* at p. 229. On the present occasion Sir Percy has not made any substantial alterations and has contented himself with such additions as have been rendered necessary by new cases and legislation, which, however, are substantial. Needless to say these amendments have been carried out with the learned editor's customary care and acumen. Unfortunately he had to call a halt to the noting of new cases in August, 1949, and was therefore unable to give us the benefit of his views on, for example, Lord Justice Denning's restatement of the law of mistake in *Solle* v. *Butcher*.

Some of the printing eccentricities noted by Mr. Landon have been corrected, but by no means all, and Mr. Hamson still remains Hansom (p. 406). A few similar curiosities have crept in as a result of the new edition, *e.g.*, the reference in n. 1 on p. 535 to the Preface presumably relates to that of the previous edition, which is not reprinted, and in n. 44 at p. 543 there is an inexplicable reference to a cave. But these are trifles and much more could be forgiven those who are still able to produce this handsomely produced book at such a reasonable price.

L. C. B. G.

The Court of Appeal in England. By Sir Raymond Evershed, Master of the Rolls. [London : The Athlone Press. 32 pp. 2s. 6d. net.]

The University of London has recently established the Athlone Press with the object, among others, of making available to a wider public than are able to sit at their feet some of the valuable lectures which from time to time are delivered in the University by eminent men. They are fortunate to be able to number among their earliest publications this admirable lecture by the Master of the Rolls which with all the felicity and clarity that distinguishes

his work gives a conspectus of the history, functions and problems of the court over which he presides with such distinction. We welcome this new venture and wish it all success, and as lawyers are gratified that legal topics should be in the forefront of those chosen for publication.

C.

THE LAWYER'S COMPANION AND DIARY, 1951. Part I, by ERNEST L. BUCK. Part II, by LESLIE C. E. TURNER. One Hundred and Fifth Year of Publication. [London: Stevens & Sons, Ltd.; Shaw & Sons, Ltd. xxiv and 1425 pp. A Day to a Page, 16s. net, plus 4s. P. T. A Week-at-an-Opening, 15s. net.]

THE amount of useful and important information collected within the covers of this book makes it truly indispensable for every practitioner. It has not only been brought up to date but also been expanded in an intelligent and attractive manner.

MEMORANDUM ON THE PRESENT CONFUSED STATE OF THE DIVORCE LAW. [London: Marriage Law Reform Society, Rooms 11/12, 20 Buckingham St., Strand, W.C.2. 8 pp.]

THE purpose of this valuable little memorandum is stated to be 'to show briefly, by means of practical examples, where confusion and inadequacy exist in the present Divorce Laws'. Many recent decisions are critically discussed. It is to be hoped that the memorandum will be circulated as widely as it deserves to be.

Other publications received:—

CRIPPS' COMPULSORY ACQUISITION OF LAND. Release 4. Oct. 13, 1950. [Stevens & Sons, Ltd.]

ENNECCERUS. LEHRBUCH DER BÜRGERLICHEN RECHTS. RECHT DER SCHULDVERHÄLTNISSE. II. Teil. 13. Bearbeitung von Heinrich Lehmann. 1950. [J. C. B. Mohr. Tübingen. DM 28.20.]

INDUSTRIAL INJURIES. By H. SAMUELS, M.A., and ROBERT S. W. POLLARD. Second edition. [Stevens. 4s.]

PROBATE AND ESTATE DUTY PRACTICE. By the late EDGAR A. PHILLIPS, O.B.E., LL.B. Second (Cumulative) Supplement to the Fourth Edition. [The Solicitors' Law Stationery Society, Ltd. 5s. net.]

REVISTA DE DERECHO PUBLICO. Año 1, Numero 2, Año 2, Numero 1. [Universidad Nacional de Tucuman.]

REVISTA DE LA FACULTAD DE DERECHO DE MADRID. Año 1949. Numero 17.

Dissidíos Coletivos do Trabalho. By Geraldo Bezerra de Menezes. 2ª Edição Aumentado. 1950. [Departamento de Imprensa Nacional. Rio de Janeiro—Brazil.]

Subordinacion y Contrato de Trabajo. By Dr. Adolfo Luís Valle. Los Derechos Sociales en la Constitucion Nacional Argentina de 1949. By Dr. Norberto Antoni. [Universidad Nacional de Tucuman. 1950.]

The Honourable Estate: A Study of Marriage and the Law in Scotland. By Anne Ashley, M.A. With a Foreword by J. W. Clyde, K.C. [The National Council of Social Service, 26 Bedford Square, London, W.C.1. 5s.]

The British Journal of Delinquency. Vol. I. No. 2. Oct., 1950.

Limited Interests in Muhammadan Law. By Kamila Tyabji, M.A., B.C.L. With a Foreword by Sir John Beaumont. [Stevens & Sons, Ltd. 1949. 25s.]

Annotated Acts. Reprinted from 'Current Law' Statutes Annotated. The Matrimonial Causes Act, 1950, together with the Colonial and Other Territories (Divorce Jurisdiction) Act, 1950. By John B. Gardner. [6s. net.] The Adoption Act, 1950. By Charles Winter. [6s. net.] The Shops Act, 1950. By G. R. Canner. [6s. net.] The Arbitration Act, 1950. By T. A. Blanco White. [6s. net.] [Sweet & Maxwell. Stevens & Sons. W. Green & Son.]

Lehrbuch des Besonderen Teils des Strafrechts. By Emil Niethammer. [J. C. B. Mohr (Paul Siebeck) Tübingen. xvi and 471 pp. 1950. DM. 16.80.]

Encyclopædia of Planning, Compulsory Purchase and Compensation. Vol. I—Planning. Revision 5. August 15, 1951.

Prideaux's Forms and Precedents in Conveyancing. 24th ed. By J. Brook Richardson, M.A., LL.B. Supplement to Vol. I. [London: Stevens & Sons, Ltd. The Law Stationery Society, Ltd. 1951.]

Indian Civil Procedure Code. Vol. I. [All India Reporter, Ltd., Congress Nagar, Nagpur 1 (M. P.). Rs. 17-8-0.]